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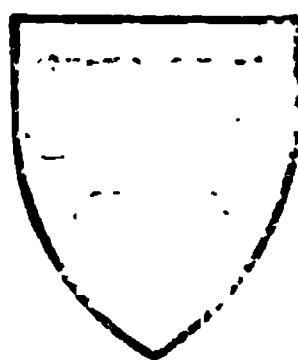
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REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA.

E. C. EBERSOLE,
REPORTER.

VOL. XXI.
BEING VOLUME LXXIX OF THE SERIES.

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HON. JAMES H. ROTHROCK, Cedar Rapids, Chief Justice.

" JOSEPH M. BECK, Fort Madison,	} JUDGES.
" GIFFORD S. ROBINSON, Storm Lake,	
" CHARLES T. GRANGER, Waukon,	
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- 2D DISTRICT—H. C. TRAVERSE, Bloomfield; E. L. BURTON, Ottumwa; CHAS. D. LEGGETT, Fairfield.
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CRESTON—S. R. DAVIS.

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REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT

DES MOINES, JANUARY TERM, A. D. 1890.

IN THE FORTY-FOURTH YEAR OF THE STATE.

PRESENT:

HON. JAMES H. ROTHROCK, CHIEF JUSTICE.	
HON. JOSEPH M. BECK,	}
HON. GIFFORD S. ROBINSON,	
HON. CHARLES T. GRANGER,	
HON. JOSIAH GIVEN,	
	JUSTICES.

STODDARD V. LLOYD *et al.*

Usury: IN JUDGMENTS CONFESSED: NEW NOTES: DEFENSE. Defendants, in actions brought against them, after filing answers, consented to judgments against them on certain notes. Afterwards new notes were given for the amount of the judgments. *Held* that, if the judgments were rendered upon usurious notes, and were confessed merely as a means of evading the law against usury, the defense of usury might be set up against the new notes, but that the makers of the notes would have the burden to prove that the judgments were of that character, and that in this case (see opinion for evidence) they failed to establish that fact. (See opinion for citations.)

Stoddard v. Lloyd.

Appeal from Montgomery District Court.—HON. H. E. DEEMER, Judge.

FILED, JANUARY 21, 1890.

ACTION to recover amounts alleged to be due on three promissory notes made by T. M. Lloyd, and for the foreclosure of a mortgage given to secure their payment. There was a trial on the merits, and a decree for plaintiff. Defendants T. M. Lloyd and Martha Lloyd appeal.

C. E. Richards and *S. McPherson*, for appellants.

W. S. Strawn, for appellee.

ROBINSON, J.—The notes in suit were given on the twenty-fifth day of April, 1884, for an aggregate of six hundred and ninety-two dollars, and provide for the payment of interest annually at the rate of ten per cent. per annum. Appellants claim that the notes are usurious, in that they were given to settle certain judgments which were tainted with usury, and which were rendered corruptly, in furtherance of a usurious contract between the maker of the notes and plaintiff. Appellants also claim that the original consideration for the notes in suit consisted of two loans, made in the year 1880, one of which was made in January for one hundred and fifty dollars, and one in June for one hundred dollars; that notes were given for said loans, which were made payable ninety days after date, and provided for the payment of interest at the rate of twenty-five per cent. per annum; that said loans were renewed from time to time by the giving of new notes, which were so drawn as to provide for the payment of interest at the aforesaid rate; that the judgments for which the notes in suit were given were rendered collusively, for the purpose of cutting off the defense of usury; and that about the first of March, 1884, T. M. Lloyd paid to plaintiff the sum of

Stoddard v. Lloyd.

\$520.55, or the amount of the original consideration of the notes, and \$270.55 in addition. The district court found that the notes upon which the judgments were rendered were usurious, and that but a part of the face of such notes was for money actually loaned and not repaid, but that the judgments were regular, and procured without fraudulent device, and that they are conclusive against the plea of usury interposed in this action. A decree was rendered against T. M. Lloyd, and in favor of plaintiff, for \$980.26, and for attorney's fees and costs, and for the foreclosure of the mortgage.

I. Appellee objects to a consideration of this case on its merits, on the ground that appellants failed to serve certain co-defendants with notice of appeal. The record submitted to us shows that all defendants who do not unite in the appeal were duly served with notice of it, and the objection is therefore not well founded.

II. The evidence in the case is in many respects conflicting and unsatisfactory, but it is clearly shown that the judgments in question were rendered on usurious notes. We are satisfied, however, that appellants' claim in regard to the sums of money received by T. M. Lloyd of plaintiff, the rate of interest, and the payments made by him are unreliable. How much usury was involved we are not required to determine. The judgments were three in number, and were rendered in a justice's court. The actions were brought in the court of a justice of the peace named Alexander. T. M. Lloyd, and two others who were sureties on the notes upon which the actions were brought, appeared and obtained a change of forum in each case to the court of another justice, named French. The defendants filed an answer in each case. Afterwards, and on the same day, Lloyd consented that judgment should be rendered against him in each case for the amount of the note in suit, and judgments were rendered against him according to his offer on the same day, to-wit, April 22, 1884. The cases were continued as to the other defendants, and the judgments against Lloyd were afterwards satisfied as of the date of

Stoddard v. Lloyd.

the notes set out in the petition in this action. Appellants claim that after the actions in a justice's court were brought, and while they were pending in Justice FRENCH's court, plaintiff approached T. M. Lloyd, and urged a settlement by the giving of new notes with security; that Lloyd was desirous of releasing his sureties from further responsibility, and finally consented to give the notes and mortgage in suit; that when Lloyd asked to have his sureties released plaintiff informed him that he would have to confess judgment in the actions then pending; that Lloyd consented, but reserved his right to the defense of usury, and so stated, in effect, to the justice when he offered to permit the judgments to be taken. If, as is claimed by appellants, the judgments were confessed merely as a means of evading the law against usury, appellants would be entitled to defend on the ground of usury in the notes on which the judgments were rendered. *Kendig v. Marble*, 55 Iowa, 386; *Ohm v. Dickerman*, 50 Iowa, 671; *Kendig v. Linn*, 47 Iowa, 62; *Mullen v. Russell*, 46 Iowa, 386. But the burden of proving that the judgments are of the character claimed by appellants is upon them. As to that, their case rests chiefly upon the testimony of T. M. Lloyd, and he is contradicted on all material points by appellee, whose testimony is corroborated in part by that of other witnesses. Appellee had brought suits against Lloyd and his sureties on three notes. They were not in court voluntarily. Appellee testifies that there was no agreement for an extension of time in consideration of the defenses being withdrawn in the actions then pending, but that Lloyd professed to desire the release of his sureties, and wished for a further loan of money; that he refused to make any arrangement while the suits were being contested, and that Lloyd then had the judgments entered against himself; that after the judgments were rendered Lloyd returned to appellee, and stated that he wished to make some arrangement in regard to them, and would give security, and that the notes and mortgage in suit were given, and a further loan of money made. Appellee's claim is at least as well supported by the evidence

Faulkner v. Closter.

as is that of appellants, and the latter must therefore fail. *Twogood v. Pence*, 22 Iowa, 543; *Miller v. Clarke*, 37 Iowa, 325; *Kendig v. Marble*, 58 Iowa, 532; *Troxel v. Clark*, 9 Iowa, 201.

III. Questions are raised as to the sufficiency of certain certificates of the trial judge to identify the evidence and make it of record, but in view of the conclusions we have reached, based on the record as it is claimed to be by appellants, we do not find it necessary to determine them.

The decree of the district court is

AFFIRMED.

79	15
136	386
136	389

FAULKNER V. CLOSTER.

1. **Sales: FAILURE TO DELIVER: MEASURE OF DAMAGES.** For breach of contract to deliver a carload of potatoes, the measure of damages is the difference between the contract and market prices at the time and place of delivery; and evidence as to the market price need not be restricted to carload lots.
2. **Appeal: REVERSAL FOR NOMINAL DAMAGES.** Where there has been a breach of contract, but the evidence shows that no actual damages have resulted to plaintiff therefrom, this court will not reverse a judgment for defendant on the ground that the trial court erred in not instructing that plaintiff was entitled to nominal damages. (See opinion for citations.)

Appeal from Shelby District Court.—HON. GEORGE CARSON, Judge.

FILED, JANUARY 21, 1890.

ACTION for breach of contract to deliver a carload of potatoes. Judgment for defendant, and plaintiff appeals.

Smith & Cullison, for appellant.

Beard & Myerly, for appellee.

GRANGER, J.—Defendant engaged to deliver “on track,” at Kirkman, a carload of potatoes, of not less than four hundred bushels. There was a failure to deliver, and this action is to recover the damages.

I. The first error assigned and argued is as to the admission of evidence as to the value of the potatoes.

1. SALES: failure to deliver: measure of damages. There seems to be no dispute as to the rule of damages in such cases,—that is, that the difference between the contract and market prices at the place of delivery is the true rule, but the controverted point is as to the method of ascertaining that difference. Appellant’s contention was below, and is in this court, that the inquiry should have been confined to the price of potatoes at Kirkman, when offered or sold in lots of four hundred bushels, or carload lots. The district court took a different view of the law, and allowed the witnesses to testify as to the market price at Kirkman, without reference to the amounts of the different sales. Of this appellant complains. The ruling of the court is right. The authorities cited by appellant (*Marsh v. McPherson*, 105 U. S. 709; 5 Wait, Act. & Def. 623; and Benj. Sales, sec. 1333) do not sustain the rule that the evidence must be as to like sales in amount, but what will be the necessary cost of procuring the same amount in the market; and it is not a matter of substantial importance whether the supply is obtained from one or repeated purchases.

II. The contract price for the potatoes was thirty cents per bushel for mixed varieties, and thirty-five cents for straight varieties. There was testimony to the effect that potatoes of the kind could be bought in the market for from twenty to twenty-five cents per bushel; and, under the testimony, the jury returned a verdict for defendant. Complaint is made of the instructions of the court, wherein it failed to instruct that, inasmuch as there was a breach of the contract, the plaintiff was entitled to nominal damages. If we concede the error as claimed by appellant, still we cannot reverse the judgment.

2. APPEAL: reversal for nominal damages.

Meier v. Shrunk.

Under the finding of the jury, there was no substantial ground for complaint by plaintiff. There was a technical breach of undertaking to deliver, but without damage to the plaintiff. This court has repeatedly said it will not reverse a judgment for that reason. *Watson v. Moeller*, 63 Iowa, 161; *Watson v. Van Meter*, 43 Iowa, 76; *Case Threshing Mach. Co. v. Haven*, 65 Iowa, 359.

III. The remaining point in argument, that the verdict is contrary to the law and the evidence, is controlled by our views as to the admission of testimony in the first division of the opinion. We see no reversible error, and the judgment is **AFFIRMED.**

MEIER V. SHRUNK.

1. **Animals: BULL AT LARGE: PERSONAL INJURY: NEGLIGENCE: EVIDENCE.** In an action for personal injuries inflicted by defendant's bull while running at large, evidence to the effect that defendant frequently permitted the bull to run at large in the road was properly admitted as bearing on the question whether the bull was at large with defendant's permission at the time of the injuries; and evidence as to the character and general reputation of the bull as being vicious, and as to what had been told to plaintiff on that subject, was properly admitted as bearing on the question of plaintiff's contributory negligence.
2. ——— : ——— : ——— : **CONTRIBUTORY NEGLIGENCE.** Whether it was negligence for plaintiff in such case to strike the bull with his cane before he was attacked was a question for a jury, after considering all the circumstances of the case.
3. ——— : ——— : ——— : **INSTRUCTION.** In such case the court properly instructed that plaintiff was not required to prove that the highway where the bull was at large was legally established, but that it was sufficient to show that the road was open to the public, and used by the public as a highway.
4. ——— : ——— : ——— : **DEFENDANT'S KNOWLEDGE.** In such case plaintiff was not required to prove that defendant knew the bull to be vicious. (See McClain's Code, sec. 2255.)

79	17
89	220
79	17
108	154
79	17
108	26
79	17
128	96
79	17
124	201
79	17
1138	300

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5. ——— : ——— : ——— : PLEADING : INSTRUCTIONS. In such case, where plaintiff alleged that by reason of his injuries he “became sick, sore and lame, and so continued for a long time, and is not yet fully recovered therefrom, during all of which time the plaintiff thereby suffered great pain, and was thereby prevented from performing his lawful business,” *held* that the allegations were sufficient to justify the court in submitting to the jury the question as to damages for loss of time, as well as the question as to damages for future disability.

Appeal from Clayton District Court.—HON. L. O. HATCH, Judge.

FILED, JANUARY 21, 1890.

THE plaintiff, for cause of action, alleges that the defendant was the owner of a vicious bull, and that, knowing it was vicious, and accustomed to attack mankind, he unlawfully permitted it to run at large; that on December 24, 1886, the plaintiff, while passing along a public highway, using due care, was attacked by said bull, so running at large, and was gored, bruised, wounded, and had three ribs broken, by said bull, by reason of which plaintiff became sick, sore and lame, and so continued for a long time, and “is not yet recovered therefrom;” that he has suffered great pain and loss of time, and was put to great expense in consequence of said injuries, and otherwise injured, to his damage three thousand dollars. Defendant answered, denying generally, and alleging that the defendant provoked the bull to attack him by striking it with a stick. Trial to a jury, and verdict and judgment for the plaintiff. Defendant appeals.

It appears, by uncontradicted testimony, that in December, 1886, the defendant resided on the north side of an east and west public road; his barn, situated east of the house, also being on the north side of said road, a short distance north therefrom,—the space between the barn and the road being open ground, and used by the defendant for feeding cattle. It also appears that about the twenty-fourth of December, 1886, the plaintiff

Meier v. Shrunk.

was traveling on foot eastward, along said road, or upon said open space, carrying a cane in his hand; that recently before defendant's children had driven said bull, with other cattle, from a field along said public road, on the open ground, south of defendant's barn; that while the plaintiff was passing, as stated, he was attacked by defendant's bull. There is more or less conflict as to all the other questions in the case. In obedience to the requirements of the court, the jury found specially that the plaintiff did strike the bull with his cane before the bull attacked him; that the plaintiff did not provoke the bull to attack him by striking it with his cane; and that the act of striking the bull did not show a want of ordinary care on the part of the plaintiff. After the verdict, defendant moved to set aside the general verdict, and for judgment for costs, on the ground that the general verdict was inconsistent with the first special finding, and that the second and third special findings were not supported by sufficient evidence, and were contrary to the evidence, and to the first finding. The defendant also moved to set aside the verdict, and for new trial, on the same grounds, and that the verdict was contrary to the evidence; that the court erred in submitting the third question to the jury, and in giving to the jury parts of the third, fourth and fifth instructions; and that the verdict was contrary to the second instruction, in that it appears from the evidence that the plaintiff, by his own negligence, contributed to the injuries complained of. These motions were overruled, to which the defendant excepted, and assigns said rulings, together with the overruling of objections to testimony, as errors.

J. Larkin, for appellant.

J. O. Crosby and *D. D. Murphy*, for appellee.

GIVEN, J.—I. The testimony objected to was to the effect that defendant frequently permitted his bull

Meier v. Shrunk.

1. **ANIMALS:** bull
at large: per-
sonal injury:
negligence:
evidence.

to run at large in the road ; as to the character and general reputation of the bull as being vicious ; and what had been told to plaintiff on that subject. There was no error in admitting this testimony. If the defendant frequently permitted his bull to run at large, that fact was proper to be considered in determining whether he was at large with defendant's permission at the time plaintiff was attacked. The disposition of the bull, and what the plaintiff knew about it, were proper subjects for consideration in determining whether plaintiff negligently provoked the attack, or whether it was made without provocation. Plaintiff's information as to the disposition of the bull was material in deciding whether he acted negligently or not.

II. Appellant's motion to set aside the general verdict, and for judgment and for costs was properly overruled. There was evidence from which

2. **—:—:—:**
contributory
negligence.

the jury might find as they did. It was not negligent of itself for plaintiff to strike the bull with his cane. Whether such striking was negligent or not depends upon the attending circumstances. If the plaintiff might reasonably believe that by striking the bull with his cane he would thereby avoid danger, he might properly do so. Hence there is no conflict between the findings, nor between them and the general verdict.

III. For the reasons already stated, there was no error in refusing a new trial on the grounds alleged,

3. **—:—:—:**
instruction.

with respect to the special findings. The general verdict is certainly not contrary to the evidence, and we think is so fully supported by it that the court should not interfere with the conclusion of the jury. The third special finding submitted by the court directed the attention of the jury specifically to the question as to whether the plaintiff was negligent; thus pointing out one of the important questions for them to determine. The court instructed the jury that the plaintiff was not required to prove that the highway

Meier v. Shrunk:

was legally established as such; that the evidence was sufficient if it showed that the road was open to the public, and used by the public as a highway; and that, if the bull was loose in such highway, not under control, he was running at large. One of the purposes of the law in requiring such animals to be restrained is that the people may not be exposed to attacks from them, while in open places, where the public may rightfully go, whether the place has been dedicated to public use or not.

The court also instructed the jury that "the defendant claims that plaintiff, in passing the bull, provoked the bull to make the attack upon him, by striking the bull with a cane or stick, without reasonable cause. If you find that the plaintiff struck the bull, and thereby excited him to make the attack, you will not assume, as a matter of law, that the plaintiff was in fault, but you will inquire whether, under the circumstances, the plaintiff had or had not reasonable cause to strike the bull with his cane. You will carefully notice what the plaintiff did, if anything; his situation at the time, as it appeared to him; and all the circumstances surrounding him; and decide whether he acted as a man of ordinary prudence or not." We repeat that it was not negligence, of itself, for the plaintiff to strike the bull and that whether the act was negligent or not must be determined by the circumstances. The instruction is in accord with this view.

The court also instructed the jury that the plaintiff was not required to prove that the defendant knew the bull was vicious, "and that every owner of a bull is prohibited from allowing his bull to run at large, and if he permit such bull to be at large on the public highway, in violation of the law, he is made liable for all damages done by such bull while so unlawfully at large, unless the injured party is himself at fault." These instructions are in accord with section 2255, McClain's Code.

Meier v. Shrunk.

Upon the subject of damages the court instructed as follows: "If you find for the plaintiff, you will assess the damages to which you believe ^{b. —:—:—:} him entitled. In so doing you will allow ^{pleading:} ^{instructions.} him (1) what he has paid out for medical and surgical treatment of his injuries; (2) a reasonable compensation for his loss of time, in consequence of the injuries inflicted upon him by the bull; (3) a just and reasonable compensation on account of the pain and anguish caused to plaintiff by said injuries; and if you find from the evidence that the plaintiff's injuries are permanent, and that a partial disability, resulting from these injuries, will continue in the future, you may allow plaintiff something, also, on account of such future disability, taking care that such allowance is just and reasonable, and supported by the evidence of the case." Appellant's contention is that plaintiff did not claim for loss of time; the petition alleging that "the plaintiff became sick, sore and lame, and so continued for a long time, and is not yet fully recovered therefrom, during all of which the plaintiff thereby suffered great pain and was thereby prevented from performing his lawful business." This is sufficient allegation to sustain an allowance of damages for loss of time. If appellant desired a more specific statement, he should have asked it by motion. While the value of his time was not as fully proven as it might be, yet there was evidence that he had been paid \$1.75 a day before the injuries. Appellant's further contention is that there is no claim for future disability. The plaintiff charges that he is not yet recovered from his injuries. This, we think, was sufficient to warrant the court in submitting the question as to future damages. We find no error in the action and rulings of the district court. The judgment is therefore

AFFIRMED.

Heald v. Owen.

HEALD *et al.* v. OWEN *et al.*

79	23
110	148

79	23
134	647

Corporations: DEFECTIVE ORGANIZATION: RIGHTS OF STOCKHOLDERS AMONG THEMSELVES. Plaintiffs and defendants were stockholders in a company of which plaintiffs were directors. The articles of incorporation were never recorded. Plaintiffs, as directors, borrowed money for the company's use far in excess of the capital stock, giving their personal obligations therefor, which, upon the failure of the company, they were obliged to pay, and they now seek contribution of the defendants on the ground that, because the organization of the corporation was defective, they were partners and not stockholders; but *held* that, as between themselves at least, they were stockholders, and that their rights were determined by the articles of incorporation, which exempted the stockholders from corporate debts, and limited the company's indebtedness to a certain percentage of the stock, which last provision the plaintiffs, as directors, violated in contracting the indebtedness in question, and that they could not recover.

Appeal from Chickasaw District Court.—HON. L. O. HATCH, Judge.

FILED, JANUARY 21, 1890.

THE plaintiffs and the defendants were members of an organization known as the "Bradford Township Creamery Association," which was organized and commenced business in the spring of the year 1883. Its affairs were conducted in such a manner that, on the tenth day of September of that year, it was indebted to the First National Bank of Nashua in about the sum of forty-eight hundred dollars, on account of overdrafts. The plaintiffs, who are four in number, are directors of the association, and they executed their personal promissory notes to said bank for said amount. This transaction afforded but temporary relief. During the fall of the year the association became further indebted to said bank, for which the board of directors, of which plaintiffs are members, mortgaged all of the property of the association to the bank, and in the spring of 1884 the

Heald v. Owen.

association went out of business, having no property nor assets whatever. The plaintiffs, having become personally indebted to the bank by executing the note for forty-eight hundred dollars, paid the same, and brought this action in equity against the other members of the association, and demanded an accounting, and that defendants should be required to contribute their *pro-rata* share of said debt to reimburse the plaintiffs. The cause was heard upon its merits in the court below, and a decree was entered dismissing the petition. Plaintiffs appeal.

J. S. Root, for appellants.

Ellis & Ellis, for appellees.

ROTHROCK, C. J.—The plaintiffs claim that the creamery association was a partnership, and that the plaintiffs, having paid a partnership debt, are entitled to contribution from the defendants. The defendants claim that, under the articles of association, they are not liable to the plaintiffs as partners, nor in any other right. To the end that the relation of the parties to each other may be fairly understood, it is proper that a brief statement should be made of the facts attending the organization of the association, and the manner in which its affairs were transacted.

It appears from the record that on the third day of March, 1883, a meeting was held at a school house in Bradford township, Chickasaw county. The object of the meeting was to organize a creamery association. A temporary organization was effected, and the meeting adjourned until March 10. At the adjourned meeting it was determined that an association should be formed and incorporated, and a plan of organization was adopted by which the capital stock should consist of one hundred shares of ten dollars each. At this meeting some seventy shares of stock were subscribed by the persons present, including the plaintiffs, and part, and possibly all, of the defendants. Officers of the association were

Heald v. Owen.

elected. At a subsequent meeting, held on April 24, 1883, articles of incorporation were adopted and signed by part of the stockholders. The evidence shows without conflict that all the members of the association contemplated and intended from the first that the association should be incorporated, and the articles of incorporation were in due form, and expressly provided that the private property of the stockholders should be exempt from liability for corporate debts. Counsel for appellants claim that, as the articles of incorporation were not adopted until after the stock was subscribed and the business commenced, they were of no binding effect, and did not change the relation of the parties to each other, and that they still continued to be partners. This position does not appear to be correct. The articles of incorporation were adopted long before the indebtedness to the bank was contracted, and the rights of the parties, as between themselves, were fixed by the articles of incorporation, at least from the time they were adopted by the association. The articles of incorporation were not recorded as required by section 1060 of the Code, and it is claimed that for this reason the stockholders are liable for the debts of the association. It is averred by the appellants that the articles of incorporation are of no validity whatever. But it is to be remembered that this is an action between stockholders. Their contractual relations, as between themselves, are to be found in what they adopted as their agreement. It was in writing, and denominated "Articles of incorporation," and either signed or adopted by the stockholders. If it be regarded as mere articles of partnership, the parties, as between themselves, should be bound by its provisions. It appears that the capital stock actually subscribed amounted to the sum of seven hundred dollars.

One provision of the articles of the association was as follows: "Art. 7. The company may, whenever necessary for the carrying on the business, or for purchasing any necessary tools, implements, materials,

Bolton v. McShane.

machinery, buildings or improvements therefor, borrow money, or contract any necessary indebtedness; provided, however, the indebtedness shall at no time exceed sixty-five per cent. of the amount of the capital stock." Under this provision, the power of the board of directors to contract indebtedness was expressly limited. Whatever may be the right of creditors as against the association, it is very plain that, if the directors violated the agreement without the consent of the stockholders, they are in no position, after having paid the unauthorized debt, to demand contribution from the stockholders; and the evidence shows that the plaintiffs were all directors of the association at the time the debt to the bank was contracted, and at the time they executed their personal note for the same. By their contract with the association they were invested with power to manage the affairs of the company, but they had no right to contract any indebtedness, nor to permit the company to become involved in indebtedness, for any sum in excess of sixty-five per cent. of the capital stock. We do not think it is necessary to further elaborate the questions discussed by counsel. We are united in the conclusion that the decree is right, and that it should be

AFFIRMED.

BOLTON V. MCSHANE.

79	26
89	282
79	26
95	199
79	26
112	738
79	26
114	698
79	26
119	167
79	26
138	437

- 1. Appeal: OBJECTION NOT RAISED BELOW.** Where a judgment sustaining a demurrer to a petition was reversed in this court and the cause remanded, and defendant afterwards filed an answer in the court below, and plaintiff made no objection, but went to trial, and his petition was dismissed, *held* that he could not then be heard to claim in this court that the controversy was fully adjudicated by the ruling on the demurrer, and that further proceedings were error.
- 2. Highways: TITLE BY PRESCRIPTION.** The mere use by the public for highway purposes of land supposed to lie along a section line, but which, by mistake, does not so lie, does not give title by prescription. In order to have that effect the use must correspond with the claim of right. (Compare *State v. Welpton*, 84 Iowa, 144.)

Bolton v. McShane.

Appeal from Linn District Court.—HON. J. D. GIFFEN, Judge.

FILED, JANUARY 21, 1890.

ACTION to enjoin defendant, as road supervisor, from removing a certain fence. The defendant demurred to plaintiff's petition on the grounds that the facts stated did not entitle the plaintiff to the relief demanded. This demurrer being sustained, the plaintiff appealed; and on the appeal the ruling of the district court was reversed, and "the cause remanded for further proceedings in harmony with this opinion." *Bolton v. McShane*, 67 Iowa, 207. The case being remanded, the defendant answered, without objection, denying every material allegation of the petition, except that the plaintiff is the owner of the land described, and averring that the plaintiff is encroaching upon the public highway, and has been obstructing the same, as established. The case was submitted to the court, and judgment rendered dismissing plaintiff's petition, and for costs. Plaintiff appeals.

Geo. W. Wilson, for appellant.

Davis & Voris, for appellee.

GIVEN, J.—I. Appellant's first contention is that the controversy was fully adjudicated by the ruling on the demurrer. It does not appear from the record that the plaintiff made any objection in the district court to the defendant's answering, nor to going to trial upon the issues joined by the answer. This court has uniformly held, and in many cases, that an objection not made, or question not raised, in the court below cannot be considered on appeal.

II. The highway in question should be upon the line between sections 4 and 5 of Linn township; and the controversy is as to whether the corners of said sections are sixty-seven links east or sixty-seven links west

1. APPEAL: objection not raised below.

 Beal & Co. v. Stevens.

of the corner, between sections 32 and 33 of Brown township. If the corner between said sections 4 and 5 is sixty-seven links west of the corner between said sections 32 and 33, then the appellant's fence is in the public highway; but, if east, it is not. We think the decided weight of the testimony is in favor of the conclusion that the corner between 4 and 5 is west of the corner between 32 and 33, and, therefore, so find.

III. It appears, beyond question, that the track traveled, and which is outside of appellant's fence, has been used for public travel for more than twenty years. It is evident that all parties supposed the traveled road to be along the section line. This court has repeatedly held that, in case of mistake of land-owners as to the division line in their lands, the possessor holding the lands as a part of his tract, and believing it to be within his boundaries, is not protected by statute. *Grube v. Wells*, 34 Iowa, 148. In *State v. Welpton*, 34 Iowa 144, it was held "that this rule is applicable to the case of the public using a way supposed to be on a certain line, but which, through mistake, is not really upon it. The claim of the public is confined to the true line. The use, in order to draw the benefit of the statute, must correspond with the claim of right." The judgment of the district court is

AFFIRMED.

2. HIGHWAYS:
title by pre-
scription.

BEAL & CO. V. STEVENS.

Draft: PRESUMPTION AS TO OWNERSHIP. Defendant was a banker, and, as such, held a note made by H. as principal and B. as surety, payable to C. H. was unable to pay it when due, and the firm of B. & Co. drew a draft "per B.," payable to defendant's order, and gave it to H. with which to pay the note. By this time defendant had severed his connection with the bank, but he indorsed the draft and assumed control of the proceeds, though he knew that they were intended to pay the note. Afterwards, on request of H., he paid the money to him. *Held* that there was nothing to indicate to defendant that H. had not paid for the draft and that he was not entitled to the money, but the contrary, and that, as defendant was charged with no duty as to the note, he was not liable to B. & Co. for the money.

Appeal from Tama District Court.—HON. G. M. GILCHRIST, Judge.

FILED, JANUARY 22, 1890.

“THE facts, as shown by the record, are that L. G. Beal, one of the plaintiffs, was surety on a note of some eighty dollars for J. S. Hunter, and payable to Crofutt. The principal not being able to pay, Mr. Beal, who resides at Gilman, drew his draft on Everingham & Co., payable to the order of C. J. Stevens, the defendant, and sent it by Hunter to the Montour Exchange Bank, where defendant was supposed to be. The defendant was not there, but the next day or two he indorsed the draft, and ordered it paid to his brother, H. J. Stevens, who, he supposed, held the note. This was about September 11, 1883. Long after this, about May 1, 1886, he gave his receipt for the money, as follows:

“ ‘Received of J. S. Hunter, by Geo. D. Young, eighty-eight dollars, September 12, 1883, to apply on a note of J. S. Hunter and L. G. Beal to C. B. Crofutt, payable at Montour Exchange Bank.

“ ‘C. J. STEVENS.’

“About June 17, 1886, or a month and a half after executing the receipt above given, the defendant, on request of Hunter, paid, or caused to be paid, the said money to him. That defendant knew at all times the object of the draft, what it was sent there for, and that Beal was surety only on the note, is undisputed. He was also charged with the knowledge that it was Beal's money, as it came to him in the form of a draft drawn by plaintiff. These facts, we think, are substantially agreed upon.” The foregoing is appellants' statement of facts, as copied from their brief, and, for the purpose of this trial, may be accepted, except as to the legal conclusion that, by the draft, defendant “was charged with knowledge that it was Beal's money.” It should further be stated that at no time before the payment of

the money to Hunter had defendant any knowledge of who owned the draft, except such knowledge as the draft itself imparted, and that Hunter delivered it at the Montour Exchange Bank for him. Upon this state of facts the district court entered judgment for defendant, and plaintiffs appeal.

J. H. Bradley and J. L. Carney, for appellants.

Struble & Stiger, for appellee.

GRANGER, J.—The defendant was evidently made payee of the draft in question, because the note was made payable at the bank of which he was then a proprietor. After the making of the note, but without knowledge to the makers, he had dissolved his connections with the bank, and was not at the bank when the draft was left there, and was under no obligation to assume any duties in reference to it. He did, however, indorse the draft, to enable the bank to convert it into money, and assumed control of the money. Under such circumstances, he could do one of two things: *First*, apply the money in payment of the note; or, *second*, return it to the person whom he had a legal duty to believe owned it. This proposition will hardly be questioned. The money was not applied in payment of the note, and was paid to Hunter; and the query is thus presented, had he a legal right to believe Hunter was the owner of the draft? Appellant attaches much importance to the fact that the draft was drawn by plaintiff to defendant, and that Hunter was not a party to it, in the sense of his name being on the paper. Hunter's only connection with the draft is the fact that he was the custodian for its delivery to defendant. He was also a co-obligor for the payment of the note. His co-obligor was not the plaintiff company, but a member of it,—L. G. Beal. The draft is in these words:

Beal & Co. v. Stevens.

“§88. L. G. Beal & Bros., Dealers in Grain and Live-Stock :

“Pay to the order of Chauncey Stevens eighty-eight dollars.

N..S. BEAL & Co.

“Per L. G. BEAL.

“*To L. Everingham & Co., Chicago, Ill.*”

From these facts, what was there to indicate to defendant that L. G. Beal owned or sent the draft to him? His name is there only as having acted for the firm in its issuance, just as it might have appeared if Hunter had bought and paid for the draft. It may aid our reasoning if we slightly change the facts. Suppose Hunter had obtained the draft from a bank entirely disconnected from the note transaction, and, in so doing, had caused the name of the defendant to be inserted as payee, and had himself delivered it, as in this case, for the payment of the note of which he is a joint maker. Who would defendant have a legal right to assume owned the draft? There seems hardly room for a difference of opinion. He certainly might assume that the parties making the draft had received pay for it. Such is the usual course of business. In what respect do the facts of this case differ? Only to the extent that L. G. Beal, who is a joint maker of the note, and a surety, is a member of the firm who issued the draft. There is nothing to indicate that L. G. Beal sent the draft, or had any interest therein other than as a member of the firm that drew it and was responsible for its payment. Hunter had the custody of a draft drawn by the firm not a maker of the note, and was seeking to apply it for the discharge of a debt, for which he was primarily liable. The defendant knew of this primary liability; and, in view of the facts, was he not better justified in the belief that Hunter procured the draft to pay his debt than that he held it for Beal, whose obligation was secondary? We think so, and that he violated no trust in paying the money to Hunter.

AFFIRMED.

79	82
109	698

79	32
d139	55

NEWANS V. NEWANS *et al.*

1. **Estates of Decedents: ALLOWANCE FOR SUPPORT OF WIDOW: HOW RAISED.** Undersection 2375 of the Code, providing that "the court shall, if necessary, set off to the widow, and children under fifteen years of age, of the decedent, or to either, sufficient of his property, of such kind as it shall deem appropriate, to support them for twelve months from the date of his death," *held* that, if the personal property is not sufficient to cover a proper allowance, real estate may be sold for the purpose. (Compare *Estate of McReynolds*, 61 Iowa, 585.)
2. ———: ———: **WHEN JUSTIFIED.** The fact that the widow in this case had no children, and had some property in her own right, but derived but little revenue therefrom, and by no means sufficient for her support, would not justify this court in setting aside an allowance made by the court below.

Appeal from Benton District Court.—HON. L. G. KINNE, Judge.

FILED, JANUARY 22, 1890.

APPLICATION by the widow of Henry Newans for an appropriation from the estate of decedent for her support for the term of one year. An order was made directing the executor of said estate to pay to plaintiff the sum of three hundred and twenty-five dollars for the purpose stated. Defendants appeal.

G. W. Burnham, for appellants.

Gilchrist & Whipple, for appellee.

ROBINSON, J.—The estate of decedent consists of personal property worth not more than five hundred dollars, and an eighty-acre tract of land of the value of two thousand dollars. The debts of the estate amount to about six hundred dollars. Of the personal property, all but one horse and one cow are exempt, and will be

Newans v. Newans.

set apart to plaintiff as her property, by virtue of section 2371 of the Code. The amount of personal property in the hands of the executors will not be sufficient to pay the allowance made.

I. Section 2375 of the Code is as follows: "The court shall, if necessary, set off to the widow, and children under fifteen years of age, of the decedent, or to either, sufficient of his property, of such kind as it shall deem appropriate, to support them for twelve months

1. ESTATES of decedents: allowance for support of widow: how raised.

from the time of his death." Appellants insist that the court erred in making an allowance out of the estate of said decedent, "for the reason that it had the effect to create a debt which the executors must pay out of the proceeds of the sale of the real estate." They further claim that the statute requires that the property to be set off for the support of the widow shall be personal property, and of such kind as shall be "deemed appropriate" for that purpose; that, since there was little or no personal property of the estate available for that purpose, there was no authority for the order made. The questions thus raised were decided adversely to appellants in *Estate of McReynolds*, 61 Iowa, 585. The primary purpose of the statute is to provide for the support of the widow of a decedent, and his children under fifteen years of age, for the period of twelve months from the time of his death. The amount required for such support is in the nature of a charge against the estate, to be discharged by the setting apart of personal property, if there be enough which is deemed appropriate; but, if there is not, then by sale of property. If the personal property is inadequate for the purpose, there is no substantial reason for not selling real estate to raise the necessary amount. It is said that, in making an appropriation, the court cannot take into consideration the real estate, because it belongs to the heirs, and not to the executors; but the interest of the heirs is subject to the payment of all valid claims against the estate. The right of the widow and children to the

Fitch v. Reiser.

allowance contemplated by the statute is of a higher character than that of the heirs.

II. It is claimed that the court erred in making an allowance to the plaintiff, for the reason that it was not shown that she needed one. It is true she
 2. —: —: when just-
 fied. has property in her own right not derived from decedent, and that she has no children to support. But it is shown that the amount of her property is not large; that her income from it is small; and that, by reason of old age and disease, her expenses for the year in question will necessarily be larger than her income. We do not think she should be compelled to dispose of her property, and thereby destroy her means of support for the future, in order to meet her expenses for the year in question, and thus save an appropriation by the court. We are not authorized, under the evidence, to disturb the finding of the district court as to the necessity for and the amount of the allowance.

AFFIRMED.

FITCH *et al.* v. REISER.

Deed: UNDUE INFLUENCE: PRESUMPTION. Where a man over eighty years old, and of feeble mind, deeded, substantially, all of his property to his daughter, to whom alone he looked for advice, and whose control of him was absolute, and the deed was without consideration, *held*, in an action by the other heirs to set it aside, that it was incumbent upon the daughter, in order to sustain the deed, to show that it was made voluntarily, and without the exercise of any influence on her part, or in her behalf, to procure the same. (Compare *Leighton v. Orr*, 44 Iowa, 679; *Spargur v. Hall*, 62 Iowa, 498.)

Appeal from Chickasaw District Court.—HON. L. O. HATCH, Judge.

FILED, JANUARY 22, 1890.

Fitch v. Reiser.

THIS is an action in equity by which the plaintiffs seek to set aside and annul a deed of certain real estate which was executed by James D. Fitch to the defendant, Martha M. Reiser. The plaintiffs and the defendant are the children of said Fitch. Upon a final hearing upon the merits the district court granted the prayer of the petition, and annulled the deed. Defendant appeals.

J. H. Powers, for appellant.

J. W. Sandusky, for appellees.

ROTHROCK, C. J.—James D. Fitch owned and for many years resided upon a farm of about one hundred acres in Chickasaw county. He was the father of the parties to this action. His wife died on the thirteenth day of September, 1886. On the twenty-first day of the same month he made the deed in question, by which he conveyed his farm to his daughter, the defendant in this action. He died on the twenty-sixth day of September, 1887, at the advanced age of nearly eighty-three years. He was a man of no education, as the term is commonly used. He was several years older than his wife, and the evidence shows that for many years prior to her death he consulted and advised with her about all of his business transactions, even to matters of the most trifling character. The loss of his wife was a great calamity to him. His children were all married, and at the time of his wife's death the daughter of the defendant, aged about thirteen, was the only member of the family. He and his wife had taken this child when she was quite young, and she remained with them as long as they lived. The defendant and her husband resided on one corner of the farm at the time of the death of the father and mother. It is claimed by the plaintiffs that the deed should be cancelled upon two grounds: (1) Because of the mental incapacity of James D. Fitch to make a valid conveyance; (2) because

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of undue influence exercised by the defendant over her father, which, in his weakened mental condition, induced him to make the deed.

The cause is to be determined upon the preponderance of the evidence upon these questions, and there is a marked conflict in the testimony of the witnesses upon the issue as to the mental capacity of the deceased at the time he executed the deed. One thing, however, is abundantly established, and that is that, by reason of the dependence of the deceased upon the advice and direction of his wife, her death was a greater bereavement to him than it otherwise would have been. The story of his lamentations over her death, as detailed by the witnesses, is a most pathetic delineation of the crushing and overwhelming sorrow of an aged man at the loss of the partner of his joys and sorrows through a long and happy married life. It was perfectly natural that he should seek counsel and advice of others, and the evidence conclusively establishes the fact that, after the death of his wife, he put himself under the care and control of his daughter, the defendant. Her power over him appears to have been as absolute as that of the mother during her life; and this dependence upon the defendant and her control over him were manifest at once upon the death of the mother.

To show the extent of this influence, we will here quote quite extensively from the testimony of Samuel D. Kenyon, cashier of the First National Bank of New Hampton, as to a business transaction he had with the deceased on the twenty-sixth day of November, 1886. The testimony of the witness is as follows: "Mr. Fitch held two interest-bearing certificates of deposit. One of them was for one hundred and seventy dollars; the other, for one hundred and eighty dollars. Both were due. He presented them for payment, but finally took payment in a new certificate of deposit (\$300), running to Emma Reiser, and the balance, of fifty dollars and interest, he took in cash. Mrs. Reiser took a very important part in the transaction. She did nearly all

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of the talking for Mr. Fitch, and directed the manner in which the transaction should be closed. When the parties came into the bank Mr. Fitch did not have personal possession of the certificates of deposit, but Miss Emma Reiser, who was one of the parties, had them in a little hand-bag. Mr. Fitch stepped to the counter, and said he came after his money. Mrs. Reiser then said: 'No, pa; you do not want the money; you want it just as we talked.' She then turned to her daughter, Emma Reiser, and received from her the two certificates of deposit, and told me that her father desired to put three hundred dollars of that money in the name of Emma Reiser, his granddaughter. The balance they wanted in cash. After some talk between Mrs. Reiser and Mr. Fitch, he said that was right. The certificate and nearly all the money she gave to her daughter, who put it in her hand-bag. She gave Mr. Fitch only a small portion of the money. The money was laid on the counter in front of Mr. Fitch, and Mrs. Reiser took possession of it. Mr. Fitch had no opportunity to count over the money, as Mrs. Reiser at once took possession of it. I think I can describe Mrs. Reiser's conduct. Mrs. Reiser was very careful that her father should not do much talking. Nearly always when he would commence to say anything she would interrupt him, and herself would make a declaration of what he wanted to say, generally concluding with the remark: 'Now, that is right, ain't it, pa?' or, 'you know that's right;' or something similar. The conversation between Mrs. Reiser and myself was quite lengthy, and embraced other matters than those I have mentioned, but all pertaining to her father and his business. She never permitted Mr. Fitch to offer any suggestions or direction as to the business, or how it should be concluded. She herself assumed the sole direction of the whole matter. I was impressed with her peculiar manner towards her father in this business transaction. During late years I have transacted business with Mr. Fitch and his wife. At such times Mrs. Fitch took an active

part in such business transactions. She always controlled and directed the transactions. I think I never had any business with Mr. Fitch alone. His wife would always come with him, and look after the business. There were times when he would come into the bank alone with a certificate of deposit for renewal or payment, but would never close the transaction alone, but would wait for his wife to come in and see to it. At the time Mr. Fitch was in the bank with Mrs. Reiser he was controlled and influenced by her absolutely; that is, so far as the business transaction involved at the time, which she absolutely directed and decided, without permitting him to express his opinion on the matter at all. He followed her direction, and acceded to her request, and complied with her orders and commands, regarding this whole business transaction in this way. He assented to them in this way. She would always close her statement with some appeal to him; such as: 'Now, you know what you want, pa;' or, 'that is right, pa, ain't it?' or words similar in meaning. Mrs. Reiser first mentioned or suggested that three hundred dollars then due Mr. Fitch should be deposited in the name of Mrs. Reiser's daughter Emma. I think it was in response to a question to Mr. Fitch as to what disposition should be made of the certificate. He made no reply to the question, as she did not permit him to, as she answered for him. He made no direction whatever that the certificate should be issued to Emma Reiser, but Mrs. Reiser gave the only directions that were given, but always concluding with some statement to her father, as, 'Now, that is right, ain't it, pa?' or words to that effect. He had not then, nor has he since, had any money in the bank. The Emma Reiser, to whom the three-hundred-dollar certificate of deposit was issued, was the daughter of the defendant, who lived with Mr. Fitch."

We have set out this evidence for the purpose of showing the absolute control which the defendant had of her father. We do not wish to be understood as

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condemning the defendant for acting as an aid and adviser to her father; but a contract or conveyance made by one to a person sustaining such relations of trust and confidence is in equity regarded in a different light from a conveyance between persons where no such trust and confidence exist.

There is much controversy between counsel as to the effect of the evidence upon the mental condition of Mr. Fitch at the time the conveyance was made. The witnesses for the defendant testify that his mind was sound, and they give instances of business transactions made by him without assistance, in which he acted intelligently. On the other hand, there are a number of witnesses in behalf of the plaintiffs who testify to many acts which indicate, not only mental weakness caused by extreme old age, but tend to show a lack of capacity to transact any business. One witness, who does not appear to be related to the parties, and who has no interest in the controversy, testified that he farmed the place for four years, from 1881 to 1884, inclusive; that he lived on the place during those years, and passed through the door-yard of Fitch's house almost daily, and was intimately acquainted with him. He met him in October, 1886, and Fitch did not know him. This witness says: "The deceased walked around the house [the home of witness] twice, and finally said: 'I can't find the way out.' He could not find the road he came in on. I went with him to where his son was putting up hay. The path on which he came was easy to find. It came straight into the door into which he came. He did not act as he did when I was on the place. His mind seemed to be affected. He repeated a story to me about his dog having killed sheep, and repeated it three times within one hour."

We are not prepared to say that the evidence in the case shows an absolute want of mental capacity to make a testamentary disposition of property. But in consideration of the extreme mental weakness of the deceased at the time the deed was executed, and as the

property in controversy embraced substantially all of his estate, and as the deed was without consideration, and in view of the relations of trust and confidence between the parties to the conveyance, we think the learned district judge was right in entering a decree annulling the deed. The control of the defendant over the deceased appears to have been absolute. Under such circumstances it was incumbent on the defendant to show that the conveyance was made voluntarily, and without the exercise of any influence on her part or in her behalf to procure the same. See *Leighton v. Orr*, 44 Iowa, 679; *Spargur v. Hall*, 62 Iowa, 498, and *Kerr, Fraud & M.* 150-152. The decree of the district court will be

AFFIRMED.

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101	638
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THE ÆTNA IRON & STEEL WORKS V. KOSSUTH COUNTY.

Contracts: BUILDING: PARTIAL FAILURE: RECOVERY: MEASURE OF DAMAGES. Where a party contracts for an agreed price to make certain improvements on real estate, but fails to comply with the contract in some particulars as to the materials used and the manner of construction, he may yet recover upon a *quantum meruit*, though the owner has not accepted the work; and the measure of his damages will be the contract price, less payments, and the damages sustained by reason of the non-compliance with the contract. (See opinion for citations.) And an instruction in this case, directing the jury to allow plaintiff the value of such items as were of real, substantial benefit to defendant, was erroneous, because it ignored the contract price.

Appeal from Emmet District Court.—HON. GEORGE H. CARR, Judge.

FILED, JANUARY 22, 1890.

ACTION in two counts. In the first, plaintiff asks to recover the contract price on a written contract for the construction of cells and other iron work alleged to have been put into the jail of the defendant county,

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and accepted by the defendant. In the second count, plaintiff asks to recover the reasonable value of the same, as having been furnished at the request of the defendant. Answer, denying generally, and denying specially that the work was completed according to contract; that the same was ever accepted by the defendant; and that the same was of any value,—and asking damages. Trial to a jury. Verdict and judgment for defendant. Plaintiff appeals.

The contract set out is “to furnish all material and labor, and complete and set up in the court house at Algona, Iowa, two steel cells and other work, more particularly mentioned in the specifications and shown on the plans which form a part of this contract, all of which said party of the first part is to do, in a good and workmanlike manner, within ninety days from the date hereof.” The specifications are quite lengthy and minute as to details, calling for plate-work, steel mesh-work, steel grated or open work, cell fronts, cell doors, lever bars, lock boxes, bunks, ventilation pipes, entrance door, steel window-gratings, and heating apparatus. Among other specifications, it is required that all exterior plate iron of cells and corridor be protected by steel mesh-work and steel bars, to be riveted in place in a certain way; that all grated work composing the walls of cells and corridor be made of grating composed of one-inch round steel upright bars, placed three inches apart, and passing through steel cross-bars two and one-half by one inch, spaced fourteen inches apart, to be fastened as specified. The front of cells and doors to be made of steel grated work. Cell doors to be hung on patent anti-friction rollers, hung to strong grooved carriers, firmly riveted to ceiling with countersunk rivets; strong guides to be riveted to floor of corridor. It is specified that “whenever the word ‘steel bar’ is used it is to signify Bristol steel,—a bar of iron covered with hard steel, and tempered so as to be practically saw and file proof.”

It will be seen that the work consisted of several separate parts. It is not contended that it was defective

in all the parts. Appellee's particular complaints are that all the bars used were composed of iron, and not of steel, and were not bars of iron with steel case-hardened, so as to render them practically saw and file proof, but are soft, and can be readily cut with a file, saw, or any sharp and hard instrument; that the mesh-work is not so as to prevent cutting the iron plate more than six inches in any direction, but in many places will permit cutting the plate as much as two feet, making holes or openings large enough for a man to escape; that the riveted work is not properly done; that the iron lining of the juvenile cell is not spiked with wrought-iron spikes, nor securely fastened to the walls, as required.

Clarke & Call, for appellant.

R. J. Danson and J. C. Cook, for appellee.

GIVEN, J.—I. There is no controversy but that if the plaintiff substantially performed the contract the measure of his recovery is the contract price, with interest. Appellant contends that if the work, though defective in some particulars, so that it was not completed in the manner specified in the contract, was yet of real, substantial value to the defendant, for the purposes for which it was intended, then the plaintiff is entitled to recover the contract price, less any damage the defendant has sustained by reason of the non-performance of the contract. Appellee contends that, in case the contract was not substantially performed by the plaintiff on its part, it is not entitled to recover anything, as the work was never accepted by the defendant, and is not of the kind and quality contracted for. The court instructed the jury that, to recover under the first count, the plaintiff must show that it had substantially performed the contract on its part, and that, if it had, the measure of recovery would be the contract price, with interest. As to the second count, the jury were instructed that if the workmanship and materials were

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not in all particulars substantially as required by the contract, but were of real, substantial value to the county, for the purposes for which they were intended, the plaintiff would be entitled to recover as much as the work was reasonably worth, not exceeding the contract price, and that in such case it is not necessary, to entitle the plaintiff to recover, that the defendant should have accepted the job, or have taken it off the plaintiff's hands; that, if the structure was of such character or quality of materials, or general style of workmanship, as to be of no real, substantial value to the defendant, for the purpose for which it was intended, then the defendant is not bound to compensate the plaintiff therefor. On motion of the defendant the court gave the following, among other, instructions: "If you find that some of the items or some of the work done is of real and substantial value to the county, and some parts or items of the structure are of no real or substantial benefit to the county, then you should allow the plaintiff only for such items as are of real value, and you should allow nothing for those items or parts that are of no substantial benefit. If the plaintiff has not complied with the contract, and, under these instructions, cannot recover on the contract, then it is not entitled to recover for either the labor or material put in. But the question then simply is, how much of material and substantial benefit has the county received, in fact? The county, not having purchased or ordered the work and material actually furnished, cannot be required to pay any more than the benefit it has really received." It is evident from the character of the structures, the manner in which they are attached to the court house as required by the specifications, and the uses for which they were intended, to-wit, for jail purposes, for warming and ventilating the court house, office rooms, and jail, that they were intended to become a part of the real estate. The kind of structures contracted for are in place, but, as is alleged, are not according to contract, as to certain parts of the material and of the

workmanship. Being placed and attached as required by the specifications, it is evident that it is impracticable to remove the entire structures, and that to do so must necessarily injure the building to some extent. That the defects complained of can be remedied so as to make the entire work according to the contract is not questioned.

II. The right of a party to recover when he has not fully performed his contract has been the subject of much discussion and some conflicting opinions. Many respectable authorities hold that, where there is a contract, the only remedy is upon the contract, and that recovery can only be had thereon upon proving a substantial performance on the part of the party asking to recover. Such is not the rule in this state. "It is now the settled doctrine in this state that a party who has failed to perform in full his contract may recover compensation for the part performed, less damages occasioned by his failure." *Wolf v. Gerr*, 43 Iowa, 339. The question was first settled in *Pixler v. Nichols*, 8 Iowa, 106, an action to recover for work done in part performance of a contract to work for six months, wherein the court says: "But where all that is shown is that, upon an agreement to labor for six months, the plaintiff labors four months and refuses to labor any longer, and sues for the value of the labor performed, we think he is entitled to recover as upon a *quantum meruit*, and need not, as a condition precedent, first show that he had performed his entire contract, or that he left the service of his employer upon good cause. We are satisfied with the rule established in *Britton v. Turner*, 6 N. H. 481, giving its full weight for the protection of the employer, in such cases, to the qualifying rule, that, where the contract is broken by the fault of the party employed, after part performance has been received, the employer is entitled, if he so elect, to put the breach of contract in defense, for the purpose of reducing the damages, or showing that nothing is due, and to deduct what it will reasonably cost to secure

Ætna Iron & Steel Works v. Kossuth Co.

a completion of the whole service, as well as any damage sustained by reason of the non-fulfillment of the contract. If, in such case, it is found that the damages are equal to, or greater than, the value of the labor performed, and that the employer, having a right to the performance of the whole contract, has not received any beneficial service, the plaintiff is not entitled to recover. See, also, *Byerlee v. Mendel*, 39 Iowa, 382. The same rule was applied in *McClay v. Hedge*, 18 Iowa, 66. In that case the plaintiff agreed to build for the defendant a barn, shed and corn-crib, under a special contract, for one hundred and fifty-five dollars, and to have it completed by a specified time. He failed to complete the barn by the contract time, and also failed to do the job in a good and workmanlike manner. The court says: "The controversy is whether, in such case, he may recover as upon a *quantum meruit*. This question was settled in this state by the case of *Pixler v. Nichols*." This rule will apply to such case as the one under consideration. A formal acceptance of the work or an acquiescence in the breach is not essential to recovery. It will be observed that in each of these cases whatever benefit there was in the part performance of the contract had been received by the party sought to be charged, and could not be returned. The benefits arising from the services rendered, the materials furnished, and labor performed in erecting the buildings were his, without acceptance. He had no choice but to use and enjoy these benefits, though but a part performance of the contract. The benefits derived from the services he could not restore, nor could he the benefits that came to him from the buildings, for they had become incorporated into, and a part of, the land upon which they stood. The structures under consideration became a part of the realty, as much as did the barn, shed and crib in *McClay v. Hedge*, and should be subject to the same rule.

III. The measure of recovery recognized in all these cases, and in *Corwin v. Wallace*, 17 Iowa, 374, is

the contract price, less payments, and the damages sustained by reason of the non-performance of the contract.

This rule effectuates perfect justice between the parties.

It gives to the defendant the benefit of his contract, by allowing him whatever it will cost to have the contract fully performed, and any other damages he may have sustained, and charges him with what he has received at the rate agreed, and thereby compensates the plaintiff, at the agreed rate, for the benefits he has conferred.

The rule given by the court to the jury might lead to a very different result. The defendant is entitled to the benefit of his contract, and to have it completed at no greater cost to him than the contract price. Assume, for the purpose of illustration, that the contract price is twenty-five hundred dollars, when in fact it is worth three thousand dollars. The defendant has a contract worth five hundred dollars to him. The other party fails to fully perform, so that it will cost five hundred dollars to complete the work according to contract. If five hundred dollars will complete it, then the work done is worth twenty-five hundred dollars to the defendant; for, by expending five hundred dollars, he will have the work contracted for, and worth three thousand dollars, but he has lost the benefit of his contract. He pays three thousand dollars, instead of twenty-five hundred dollars, for the work. By the approved rule, you deduct the cost of completing the work, five hundred dollars, from the contract price, twenty-five hundred dollars, and the defendant, upon the basis of the contract, pays two thousand dollars for the part performed, and five hundred dollars to complete the work, and thereby has the full benefit of his contract. It is sufficient to say that the rule given to the jury is not the approved rule, and is one that may lead to quite different results.

IV. That the verdict is contrary to the law, as given in the instructions, and to the evidence, is very apparent. There was no question made as to a large part of the work; no complaint against the furnace, the

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ventilating appliances, and many other parts of the work. The jury were instructed, at the request of the defendant, that they should allow the plaintiff for such items as were of real, substantial benefit to the county, and yet the verdict was for the defendant. We think the court erred in instructing the jury as to the measure of recovery, and in overruling the motion for new trial, as the verdict is contrary to the law and the evidence.

REVERSED.

THE STATE V. SHANK.

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1. **Criminal Practice : LOST INDICTMENT.** The indictment in this case having been lost, a copy was substituted after the jury was impaneled and sworn. *Held* that the objections that the jury was not sworn to try the case upon a copy of the indictment, and that the court had no jurisdiction to impanel a jury when no indictment was in existence, were merely technical, and did not affect the merits, and was no ground for reversing a judgment of conviction.
2. **Liquor Nuisance : ELEMENTS OF CRIME : INSTRUCTION : ERROR WITHOUT PREJUDICE.** In a prosecution for keeping a liquor nuisance, an instruction which ignores the fact that, to constitute the crime charged, the existence of intoxicating liquors in the place described is essential, is erroneous (*State v. Tierney*, 74 Iowa, 238); but such error is without prejudice where it is clearly shown in the evidence, and not questioned, that such liquors were kept in the place named.
3. — : **REGISTERED PHARMACIST : PRESUMPTION FROM LIQUORS FOUND ON PLACE.** The finding of intoxicating liquors in the place named in an indictment for liquor nuisance is presumptive evidence that they were kept for unlawful sale (Laws of 1886, ch. 66, sec. 8); but the presumption is not conclusive; and where the defendant claimed to be a registered pharmacist he was entitled to rebut the presumption by showing that fact to explain the purpose for which he had the liquors. The instructions in this case, taken together, sufficiently state this rule, and are not erroneous.
4. — : — : **AMOUNT OF LIQUORS ON HAND AS EVIDENCE.** Where a registered pharmacist is on trial for keeping a liquor nuisance, the jury may consider the quantity of liquors kept by him, in connection with the legitimate demands of his business, in determining whether such liquors were kept for a lawful purpose. (See *State v. Shank*, 74 Iowa, 651.)

5. ——— : ——— : TIME : INSTRUCTION. In such case it was error to instruct the jury to determine whether the defendant kept intoxicating liquors for illegal purposes during the time covered by the indictment, when defendant, as a registered pharmacist, could lawfully sell such liquors during a portion of that time; but the error was without prejudice, since counsel for the state waived all claim as to matters which transpired during the time when defendant could lawfully sell such liquors, and for the further reason that the court, in another instruction, properly limited the time to be considered by the jury.
6. **Appeal: ERRORS NOT REVIEWABLE.** Where, by agreement, a transcript of the evidence of a witness given upon a former trial of the case was admitted,—the witness being absent,—the rulings made on the former trial, as shown by the transcript, cannot be reviewed on appeal from the second trial..

Appeal from Montgomery District Court.—HON. H. E. DEEMER, Judge.

FILED, JANUARY 22, 1890.

DEFENDANT was indicted and tried for the crime of nuisance, and found guilty. He was adjudged to pay a fine of three hundred and fifty dollars, an attorney's fee and costs. From that judgment he appeals.

C. E. Richards and *S. McPherson*, for appellant.

John Y. Stone, Attorney General, and *R. W. Beeson*, County Attorney, for the State.

ROBINSON, J.—The indictment was found on the twenty-first day of June, 1887, and charged defendant with having committed the crime in question by unlawfully keeping for sale and selling intoxicating liquors in the city of Red Oak. During the time covered by the indictment defendant was a registered pharmacist. This cause was submitted in this court on a former appeal. See 74 Iowa, 649.

I. After the jury was duly impaneled and sworn on the last trial, the county attorney stated to the court that the original indictment was lost, and moved that a copy thereof be substituted therefor. The motion was

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resisted by defendant, but sustained by the court after a showing that the original was lost. Appellant contends that the substitution was not in fact made, but the transcript shows clearly that it was. The record of the order made by the court is as follows: "And, it appearing to the court that the original indictment in this case has been lost, the county attorney moves to substitute a copy thereof, which motion is supported by oral testimony, and motion submitted; and upon due consideration it is ordered by the court that said motion be sustained, and that the copy of the indictment marked 'Exhibit A' by the short-hand reporter is substituted as and for the original indictment found herein." We think the orders of substitution and identification were sufficient.

II. It is objected by appellant that the jury were sworn to try the case upon the indictment as returned by the grand jury, and not upon a copy substituted therefor; and, that the jury having been sworn before the copy was substituted, they were impaneled and sworn when no indictment was in existence, and when the court had no jurisdiction to impanel a jury. The objection made is technical, and does not go to the merits of the case. It was said in *State v. Rivers*, 58 Iowa, 107, that the court possesses an inherent power to preserve and protect its jurisdiction when it has once attached, and that it is the modern practice to disregard unimportant technicalities, not vital or material to the rights of the parties. In contemplation of the law, the copy of the indictment substituted for the original is, in effect, the original, and is to be so treated. The substitution relates back to the presentment by the grand jury, and may be made whenever it is discovered that the original is lost. It was not necessary for defendant to replead after it was made. The issues were not in any manner changed by it, and it must be presumed that the jury were sworn to try those issues. We are of the opinion that the objection is not well founded.

1. CRIMINAL
practice: lost
indictment.

The State v. Shank.

III. Appellant insists that the evidence to show that the original indictment was lost was not sufficient. We have read the evidence on that point as it appears in the abstracts and in the transcript, and conclude that it fully sustains the ruling of the court.

IV. The second paragraph of the charge to the jury is as follows: "The defendant in the first instance

2. Liquor
nuisance:
elements of
crime: in-
struction:
error with-
out preju-
dice. is presumed to be innocent, and this presumption continues until he is proven guilty beyond all reasonable doubt. The plea of not guilty casts upon the state the burden of showing, by clear and satisfactory proof, either that since the eighth day of April, 1886, and prior to the twenty-first day of June, 1887, the defendant in this county kept, managed or controlled the lower story and cellar of the building described in the indictment, for the purpose of selling intoxicating liquors, or that, within the time named and at the place above stated, the defendant managed, kept or controlled the said lower story and cellar of the building aforesaid, for the purpose of keeping for sale therein intoxicating liquors, and, if either of these matters is shown beyond all reasonable doubt then the defendant should be convicted; but if neither of them is shown by that quantity of the testimony, then the defendant should be acquitted." It is insisted by appellant that the instruction is erroneous, in that it ignores the fact that, to constitute the crime charged, the existence of intoxicating liquors in the place described was essential. There can be no question that the claim is well founded. See *State v. Tierney*, 74 Iowa, 238, and cases therein cited. Counsel for the state concede the error, but contend that it was not prejudicial for two reasons, to-wit: (1) The fact that intoxicating liquors were kept in the place described was clearly shown, and not questioned; (2) the error was cured by other parts of the charge. No issue was made on the trial as to the fact that defendant kept intoxicating liquors in the place described in the indictment. Officers testified, without contradiction, that they found such liquor there during

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the time covered by the indictment, and defendant testified to keeping it. Other portions of the charge tended to cure the omissions in the second paragraph, but we do not attach much weight to that fact. We should not deem it necessary to reverse a judgment for the omission of the court to instruct the jury that they could not convict unless they found a fact which was substantially admitted of record. In our opinion, the error in question was without prejudice.

V. The eighth paragraph of the charge was as follows: "With reference to the liquor which it is claimed

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istered phar-
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place.

was taken from the building in controversy, you are instructed that the finding of intoxicating liquors, except in the possession of one legally authorized to sell the same, or except in a private dwelling house, is, by an act of the general assembly which took effect April 9, 1886, made presumptive evidence that such liquors were kept for illegal sale. And as there is no proof that, during the time as to which you are to inquire, the defendant was legally authorized to make sales of liquor, the presumption arises that the liquors, if any, that were found upon the premises described in the indictment were kept for illegal sale. This presumption, however, is not conclusive, but may be rebutted by any testimony which shows that such liquors were kept for a lawful purpose." Appellant complains of this instruction on the ground that, it having been admitted that defendant was a registered pharmacist during the time in controversy, it thus appeared that he had the right to keep intoxicating liquors for the purpose of compounding medicine and filling prescriptions. Therefore there could be no presumption that he kept such liquors for an unlawful purpose. The instruction was authorized by section 8, chapter 66, Acts Twenty-first General Assembly. As applied to the facts in this case, it required modification or explanation, and that is found in other portions of the charge. The jury were instructed in the ninth and tenth paragraphs of the charge that, as a registered pharmacist, defendant had a right to keep

intoxicating liquors needed by him for the purpose of making tinctures, compounds and prescriptions in his business, and to keep such liquors for his own use. They were also instructed that they were required to determine from all the evidence in the case whether defendant kept intoxicating liquors for an illegal purpose. We are of the opinion that the eighth paragraph of the charge, construed with other portions of it, was not erroneous. It permitted defendant to rebut the presumption created by law from the facts stated, by showing that he was a registered pharmacist, and such other facts as might be relevant and competent.

VI. The appellant complains of a part of the charge which instructed the jury that defendant might

4. — : — :
amount of
liquors on
hand as evi-
dence. “keep such an amount of any kind of liquors as are necessary, not only for present use, but for a reasonable time in the future.”

The jury were further instructed as follows:

“In arriving at your conclusions, * * * you should, so far as can be gathered from the testimony, consider the amount and kinds of intoxicating liquors kept by the defendant in the place in question—if any are shown to have been kept by him—and the purpose for which the same were used by the defendant in his pharmacy, for the necessities of compounding medicines and tinctures only.” Appellant complains of the portion of the charge first quoted, on the ground that it is not the law that a pharmacist can keep on hand intoxicating liquors only for present use and for a reasonable time in the future. The charge must be considered as a whole, and as applied to the evidence in the case. It was contended on the part of the state that the stock of intoxicating liquors kept by defendant was so large as to furnish some ground for the presumption that it was not all designed for lawful purposes. Defendant offered evidence which tended to show that he had on hand, at the time in question, no larger quantity of such liquors than a reasonably prudent man of business would provide for his trade. The instruction was as favorable to defendant as to plaintiff. We think it was proper for the jury

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to consider the quantity of liquors kept by defendant, in connection with the legitimate demands of his business, in determining whether or not such liquors were kept for a lawful purpose. *State v. Shank*, 74 Iowa. 651.

VII. Appellant complains of a part of the charge which instructed the jury that they were to determine whether intoxicating liquors were kept by defendant for illegal purposes "during the time covered by the indictment." The language quoted was erroneous, and we so held on the former appeal. The error was without prejudice on the last trial, however, for the reason that during the examination of witnesses counsel for defendant asked that the state be required to confine its evidence as to time to the period either before or after April, 1886; and in response to that request counsel for the state waived all claim as to matters which transpired prior to April 8, 1886, and for the further reason that the second paragraph of the charge limited the time which the jury could consider to that between the eighth day of June, 1886, and the twenty-first day of June, 1887. The jury must have understood, therefore, that "the time covered by the indictment" was that last described.

VIII. Appellant complains of rulings of the court which it is alleged excluded certain competent testimony which would have been given by witnesses Hindman and Ross. After the ruling as to the testimony of Hindman was made, he was recalled, and permitted to testify fully in regard to the controverted matter. Ross was not present on the last trial, and his testimony was submitted in the form of a transcript of that given in a former trial. It was so submitted by agreement. The rulings in question were made on the former trial, and not on the last, and are not properly here for consideration.

IX. Appellant contends that the verdict is contrary to the evidence. We have read the evidence with care, and are of the opinion that it is sufficient to sustain the verdict. The judgment of the district court is

AFFIRMED.

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89 325

PEARSON V. QUIST *et al.*

1. **Sale: DELIVERY.** Where a farmer sold his farm and his personal property, selling a team to his wife, who rented the farm of the purchaser, and with the aid of her son cultivated it, while the husband engaged in other business and ceased to have any control of the farm, *held*, as against the husband's creditors, that there was a delivery of the team.
2. ———: **EXEMPT PROPERTY: RIGHTS OF CREDITORS.** Creditors have no right to question the validity of a sale by their debtor of exempt property.
3. ———: **PAYMENT WITH OTHERS' MONEY: RIGHTS OF CREDITORS.** Creditors cannot attack a sale of property made by their debtor on the ground that the money used in paying for it belonged to third parties.

Appeal from Page District Court.—HON. GEORGE CARSON, Judge.

FILED, JANUARY 23, 1890.

THIS is an action of replevin for two mules, a wagon and harness. The plaintiff is the wife of Peter Pearson, who was the defendant in execution on a judgment owned by the defendant Martin. The defendant Quist was a constable, and he levied the execution on the property in controversy. The plaintiff claims that she was the owner of the property when the execution was levied, and that "the team, wagon and harness were the only property of the kind owned by either plaintiff or her husband." There was a trial by jury, verdict and judgment for the plaintiff, and defendants appeal.

C. S. Keenan and G. B. Jennings, for appellants.

J. E. Hill and James McCabe, for appellee.

ROTHROCK, C. J.—The evidence shows in a general way that Peter Pearson was a farmer; that he was in debt for his land, and was compelled to sell it on

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account of said indebtedness. He also sold all of his teams, except that in controversy. He sold the mules, harness and wagon to his wife. She rented the farm from the purchaser, and, with the assistance of her son, carried on the farming business. A question is made whether there was a delivery of the property to the plaintiff. We think the evidence shows that there was such delivery. The husband ceased to have any control of the farm. He quit farming as a business, and went into the "stone business and well business." This amounted to a delivery. The property was exempt from execution as long as it was held by the husband, and as long as his business was that of a farmer. It being exempt from execution, he had the right to sell it or give it away, and his creditors had no right to question his authority to do so. Complaint is made by appellants because the consideration paid for the property by the plaintiff was not all her own, but that it was in part money belonging to her children. It may be the children might object to a wrongful conversion of their money, but that is a matter of no concern to the defendants. We think we have in these general observations disposed of every question in the case which demands consideration.

AFFIRMED.

REBELSKY V. THE CHICAGO & NORTHWESTERN RAILWAY
COMPANY.

Railroads: INJURY TO BRAKEMAN: CONTRIBUTORY NEGLIGENCE.

Plaintiff was middle brakeman on defendant's freight train. He saw a car in bad order attached to the rear of the train by means of a chain, and knew that it was so attached because the draw-bar was gone. The absence of the draw-bar permitted the bad-order car to come so near to the car to which it was attached as to crush a person standing between. The bad-order car afterwards became detached from the train, and plaintiff went back to assist in attaching it again. When he passed the rear of the train it was

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moving slowly forward, and the bad-order car, which was about fifteen feet from the train, was being pushed along slowly toward the train by another employe. Plaintiff took hold of the side of this car, at the end nearest the train, and helped push it along. After moving along a few steps, he went between the bad-order car and the train to adjust the chain, and very soon he was caught between the car and the train, which meantime had come to a stop, and he was seriously injured. *Held* that plaintiff was himself guilty of negligence contributing to the injury, and that he could not recover of the defendant on account thereof.

Appeal from Clinton District Court.—HON. A. HOWAT,
Judge.

FILED, JANUARY 23, 1890.

ACTION to recover damages for a personal injury to the plaintiff, alleged to have been caused by the negligence of the defendant in the operation of its railroad, without fault or negligence on the part of the plaintiff contributing thereto. The case being on trial to a jury, and the plaintiff having introduced all his evidence, the defendant moved the court to instruct the jury to find for the defendant, which motion was sustained, and verdict accordingly. The plaintiff moved for a new trial on the grounds that the court erred in sustaining defendant's motion, and so instructing the jury, which motion for new trial was overruled, and judgment entered against plaintiff on the verdict; to all of which plaintiff excepted, and from which he appeals, assigning as errors the sustaining of defendant's motion instructing the jury to find for defendant, overruling plaintiff's motion for a new trial, and entering judgment on said verdict in favor of the defendant.

Walker Bros. and Robert T. T. Spence, for appellant.

Hubbard & Dawley, for appellee.

GIVEN, J.—I. The discussion rests entirely upon the action of the court in sustaining defendant's motion, and instructing the jury to find for the defendant. The grounds of the motion were that the uncontradicted

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evidence shows that the plaintiff was guilty of negligence directly contributing to his injury; that he voluntarily assumed to be between the cars when he did, and at his own risk; and that there is no evidence that the injury was caused by any negligence of the defendant, or its agents, or its employes.

The facts appearing from the testimony are substantially as follows: In the forenoon of March 31, 1888, freight train No. 18, on the defendant's line of road between Belle Plaine and Clinton, arrived at the station of Stanwood, on its way east. On its arrival there, defendant's agent at that station handed the conductor of the train a telegraphic order to take on a "bad-order" car and haul it to Clinton, where the company had repair-shops, for repairs. The plaintiff, Frederick Rebelsky, who was middle brakeman on this train, took this order in duplicate from the conductor, who told him it was an order to take a bad-order car to Clinton, and went to the rear of the train to give one of the copies to the rear brakeman. While on his way to the rear brakeman, the train pulled up, preparatory to backing it onto the sidetrack, where the bad-order car was standing. The rear brakeman and the plaintiff walked down to the bad-order car; the rear brakeman getting a chain with which to chain it to the rear end of the way-car,—the rear car of the train. After the train had backed down so that the way-car was in position to have the bad-order car chained up to it, the plaintiff was still there, and offered to help the rear brakeman pass the chain around the king-bolt of the bad-order car. The rear brakeman said to him: "Never mind. I will fasten it myself." Then the plaintiff took the other copy of the order to the head of the train and gave it to the engineer. When the bad-order car was secured to the way-car, train No. 18 proceeded east, and arrived at the station of Lowden about noon. On the way from Stanwood to Lowden, the plaintiff rode on top of about the middle car in the train. No. 18 had orders to meet another freight train—No. 29, west-bound—at Lowden;

and, on coming into Lowden, No. 18 came in on the main track and stopped so that the way-car and bad-order car did not clear the switch. No. 29 was standing on the north sidetrack, ready to pull west as soon as the track was clear. When No. 18 stopped, the plaintiff got down off the top of the train, and got into the way-freight car, which was about in the middle of the train, to sort out the way-freight which was destined for Lowden station. While in the car, No. 18 started to pull up a little,—probably to clear the switch so 29 could get out; and, a moment after it started, the plaintiff heard the engine of No. 29 whistle for brakes. He got out of the way-freight car, and went back to see what was the matter, and saw that the bad-order car had become detached from the way-car. No. 18 was moving at a very slow rate of speed when the plaintiff passed the way-car on his way to the bad-order car. The grade of the track was slightly descending from the switch, before mentioned, to the station. Meanwhile a brakeman from train No. 29 had gone over to the bad-order car, and was pushing it east, toward the way-car of No. 18, at a slow rate of speed, which was unknown to plaintiff, and of which no warning had been given. The plaintiff walked towards the bad-order car, and, when he reached the east end of it, it was just moving over the switch; and, when plaintiff passed the way-car of No. 18, the bad-order car was about fifteen feet west of the way-car. He walked along the north side of the track until he came to the northeast corner of the bad-order car. He then faced east, and helped to push the car along toward the way-car of No. 18. After walking east with the car a few steps, he saw the chain which connected the way-car to the bad-order car, and which had been put onto the dead-woods of the bad-order car by the brakeman of No. 29 before he started to push the car, dropping down towards the ground. Without looking to see how far distant the bad-order car was from the way-car of No. 18, and without looking to see whether No. 18 had stopped or not, he stepped in front

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of the bad-order car to pick up the chain, fearing, he says, that the hook in the end of the chain might catch in the switch rod, and stop the bad-order car. He took two or three side steps while in the act of gathering up the chain; and just as he rose up, with the chain in his hand, he was caught between the way-car and the bad-order car. His collar-bone was broken, and he suffered the other injuries complained of in his petition. The only defect that the bad-order car had was the absence of a draw-bar from its then east end. Plaintiff knew that there was some defect in the coupling apparatus, but did not know its exact nature. The draw-bar was entirely gone, and this was apparent at the slightest glance. Plaintiff did not look to see what the nature of the defect was, though when he stooped down to pick up the chain his eyes and nose were within six inches of the defective parts. When the way-car and the bad-order car came together, by reason of the absence of a draw-bar from the bad-order car, the draw-bar of the way-car slipped in between the dead-woods of the bad-order car, and allowed the two cars to come so close together as to crush the plaintiff. The negligence charged against the defendant in the petition is, "that said defendant, at the time said disabled car was attached, failed to properly attach the same, and was negligent therein, and by reason thereof said car became detached at Lowden;" and "that said defendant was negligent in hauling said disabled car, in its then condition, in the manner it did." In support of these charges, appellant contends that the defendant was negligent in ordering a bad-order car into that train; that it was negligently and insufficiently attached; that defendant was negligent in not notifying plaintiff that the draw-bar was gone, and in not giving signals; that the car was being pushed, and that the train was about to be stopped. Appellant also contends that it was his duty to go in and attempt to take up the chain when and as he did; that in doing so he had a right to, and did, believe that the draw-bar was so in place that it would

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not be extra hazardous to do so; and therefore he was not guilty of negligence contributing to his injury.

II. To enable the plaintiff to recover, he must show that the defendant was guilty of negligence in one or both of the respects charged in the petition; that the negligence charged, of which the defendant was guilty, was the proximate cause of his being injured to his damage; and that he was free from negligence contributing to such injury. "If the facts are such that but one conclusion can reasonably be drawn from them, it is the province of the court to determine that conclusion. But, if different minds might reasonably reach different conclusions from them, the parties are entitled to have the question determined by the jury." *Whitsett v. Railway Co.*, 67 Iowa, 159, and cases therein cited. There being no counter or conflicting testimony, we are to take that introduced as true, and say whether different minds might reasonably reach different conclusions therefrom. That the defendant might haul its disabled car from where it was to the shops for repairs at a proper time, and in a proper manner, is not questioned; nor is it questioned but that it was proper to haul it in daytime, and in a freight train. The draw-bar being out, a chain was used in attaching the bad-order car to the rear of the train. There is no testimony to show that it should have been attached elsewhere in the train, or that there is any better or safer appliance known for making couplings in such cases than a chain such as was used. There is nothing to show how the coupling was made, or that it could have been made in any different way. The fact that the chain came loose indicates that the attachment was not perfect, but there is nothing to show that it could have been more so. The chain was used to meet an emergency; and, for aught that appears, it was the best known appliance, and was used in the best known way to meet that emergency. The defendant had notified the plaintiff that it was a bad-order car. He knew that a chain was used in attaching it, and consequently must have known that the usual appliance

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for coupling was out of order. The absence of the draw-bar was obvious, and with his attention called to it, as it had been, by the order and the use of the chain, could not have escaped his notice when he went in to pick up the chain, if he had exercised the slightest care. Neither the engineer of this train, nor the man that was pushing the disabled car, had any reason to expect that the plaintiff was going between the cars when and as he did, and therefore had no reason to give signals that the train was to be stopped, or that the bad-order car was being pushed. The plaintiff knew the bad-order car was moving towards the train, and that the train might be stopped so they would come together. By the exercise of care he would have known that the train had stopped, and consequently the danger. The only reasonable conclusion that can be drawn from this testimony is that it does not even tend to show that the defendant was negligent in either of the respects charged, and fails to show that the plaintiff was free from negligence on his part. The judgment of the district court is

AFFIRMED.

SAAR V. FINKIN.

Evidence: CONFLICT: WHAT CONSTITUTES: PROVINCE OF JURY. It is not essential to a conflict of evidence that the testimony shall come from opposing sides; but if the statements and facts in evidence are such that they lead the mind to opposite conclusions as to a particular fact in issue, then there is a conflict of evidence, and its reconciliation, in a law action, is the peculiar province of the jury, or of the trial court, where the trial is to the court without a jury, and this court will not interfere. Accordingly, where a transfer of personal property from father to son had the effect to defeat the father's creditors, who challenged the validity of the transfer, and the testimony of the members of the family was all designed to sustain it, but in fact showed a very loose transaction, which might be consistent with an honest intention, but such as is often engaged in between members of a family to defeat creditors, *held* that there was a conflict of evidence, though the testimony was not contradicted.

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96	408
79	61
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Appeal from Mills District Court.—HON. H. E.
DEEMER, Judge.

FILED, JANUARY 23, 1890.

THE issues in this case involve the ownership of certain personal property levied upon at the instance of plaintiff, as the creditor of John Finkin. Intervenor avers that he owns the property, and asks its release from the levy. Judgment for plaintiff, and intervenor appeals.

Stone & Gilliland, for appellant.

Flickinger Bros., for appellee.

GRANGER, J.—This case was before this court on a former appeal, and the opinion is to be found in 71 Iowa, at page 425. At that hearing the judgment was reversed because of an erroneous instruction. At the next trial the cause was submitted to the court, without a jury, on the written testimony and records of the former trial, by stipulation. The only error assigned is that the judgment of the court is not sustained by the evidence.

The rule that, in a law action, where there is a conflict of evidence on which the finding of the court or the verdict of the jury rests, we cannot interfere, is well settled, and we do not understand it to be questioned in this case; but it is argued that there is no conflict. The precise question is as to the fraudulent transfer of the property from John Finkin to the intervenor, his son. The facts of the case are stated in the opinion on the former hearing, and it is unnecessary to restate them here. The former opinion, in considering the validity of an instruction in the first division, deals to some extent with the testimony and the facts, and, although used for another purpose, shows quite clearly that the testimony is conflicting. Many other facts and circumstances might be added, among which are these: That the sale was made in a loose and unbusinesslike manner. The son was to take the property of

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the father, and pay his debts, and cancel his claim for services rendered. These services were rendered under an agreement, as stated by the father, to this effect: In 1878, when the son became of age, and after the father and mother had talked over the matter as to Thomas, the father says: "We called him in, and asked him if he would work any longer for us, or on what terms. He says: 'Well, I will work for you.' 'Well, on what terms? What pay will you have?' 'Well, just what you are content to give me,—what you want to do for me.' We made no further agreement than that I told him: 'If you work for us until you go to keeping house, I will make it right with you. I will pay you what is right.' That is the agreement we made. Under this agreement he worked for me—tended the farm, until the fall of 1884." At the time of this agreement, as stated by the father, the amount of the indebtedness to be paid by the son was not definitely known. It was some five or six hundred dollars, but did not include the debt of the plaintiff, which it appears grew out of signing a note as surety. That the contracts for services to be rendered, and of settlement, were such as would not be made by persons of ordinary prudence, not thus related, must be conceded. It was a transaction so indefinite and loose in its terms as to be well adapted to any emergency or purpose the parties might wish to use it for. It was quite readily adjustable to an honest or a dishonest purpose. We believe that many such family transactions take place entirely free from fraudulent taint. Again, we know that many are conceived and nurtured in fraud. Hence, where the effect is to leave the creditors unpaid, the transaction is viewed with suspicion. It is true there are no witnesses to contradict the intervenor and his witnesses as to the transaction, for it transpired entirely in the family; and there is much evidence, not recited in this opinion, very favorable to the intervenor, and on which a finding might have been based for him. But that does not show that there is no conflict of evidence. It is not essential to a conflict of evidence that the testimony

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shall come from opposing sides; but if the statements and facts in evidence are such that they tend to lead the mind of the court to opposite conclusions as to a particular fact or issue, then there is a conflict of evidence, and its reconciliation, in a law action, is the peculiar province of the *nisi prius* court. We believe, without doubt, there is a conflict of evidence in this case, and that it is of a character that we cannot hold that the finding of the court below was a result of passion or prejudice. Under such circumstances, we cannot reverse the judgment, and it is **AFFIRMED.**

MILLER V. MURFIELD *et al.*

1. **Deed: UNDUE INFLUENCE.** The evidence in this case (see opinion) shows that an aged and infirm woman, whose death was expected soon to occur, for no consideration except love and affection, made a deed of all her land to her children, exclusive of plaintiff, who was a daughter; that she had expressed a desire to make some provision for plaintiff, but was overborne by the influence of some of the defendants, in whose care she was, and who were at enmity with plaintiff's husband; that the deed had been prepared by some interested person a week or more before it was executed, but had never been read to or by the grantor, and that she executed it to avoid further trouble, without knowing its full contents. *Held* that it was properly set aside as being procured by fraud and undue influence.
2. **—: NO DELIVERY.** A deed of land by a father to a son, executed on the same date as the father's will, and enclosed in the same envelope as the will, and never discovered, nor known to the son, until after the father's death,—the son, in the meantime, leasing and paying rent on the very land described in the deed, was of no effect as a deed, because never delivered.

Appeal from Jones District Court.—HON. J. H. PRESTON, Judge.

FILED, JANUARY 23, 1890.

ACTION in equity for the partition of real estate. There was a trial by the court, and a decree for the plaintiff. The defendants appeal.

Sheean & McCarn, for appellants.

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79	64
f133	324

J. W. Jamison and Remley & Ercanbrack for appellee.

ROBINSON, J.—The land in controversy was formerly owned by J. S. Murfield, who died testate on the twelfth day of October, 1886. By his will he devised to his wife, Elizabeth A. Murfield, all the land in certain sections numbered 14 and 15, and to their five sons and to two daughters, all of whom are parties defendant, the remainder of his land. By a codicil it was provided that after the death of Elizabeth all the property left to her should be equally divided between the sons and daughters aforesaid. Elizabeth died intestate on the twenty-ninth day of April, 1887. The plaintiff is a daughter of decedents, and claims to be the owner of an undivided one-eighth of the land devised by her father to her mother, and of an undivided one-twenty-fourth of certain other lands, which her father owned at death, and claims that defendants own all other interests in the land in question. Plaintiff asks that her shares as aforesaid be confirmed, and that partition thereof be made. One of the defendants, Mary L. Holden, does not answer. The other defendants deny that the mother died seized of any land whatever. They claim that on the twenty-second day of April, 1886, J. S. Murfield and Elizabeth A. conveyed to defendant John B. Murfield a part of the land in dispute; that the will of J. S. Murfield limited the interest in land devised to his wife to a life-estate; that all his interest in real estate not given to his wife was devised to defendants; and that on the twenty-second day of January, 1887, Elizabeth conveyed all her interest in the land in controversy to defendants. Plaintiff denies the delivery of the alleged deed to John B. Murfield, and alleges that the deed of January 22, 1887, was procured by fraud and undue influence, and that it should be set aside. The district court found that plaintiff was entitled to the interests claimed by her, and decreed a partition of the premises in dispute.

I. The matter first discussed by counsel for appellants is the validity of the deed executed by Elizabeth Murfield on the twenty-second day of January, 1887. It is claimed, and we think justly, that it was the desire of J. S. Murfield, as indicated by his will, not to leave to plaintiff any interest in his real estate. The will, as first drawn, bequeathed to her three hundred dollars, but the codicil revoked that bequest, and provided that she should have the interest on that sum until her two oldest children should become eighteen years of age, when the sum should be paid to such children. The deed of Elizabeth to defendants recites that it is for the consideration of love and affection, and for the purpose of carrying out the wishes of the grantor's deceased husband. It conveys by quitclaim all the interest of the grantor in the estate of her late husband, excepting that which she acquired by his will. The closing paragraph of the deed is as follows: "And this conveyance is made also to give full effect to said will, and so that the entire estate of said deceased will be disposed of according to the provisions of said will when the same is admitted to probate." It was dated January 15, 1887. When the deed was executed, Elizabeth was living with her son John. Her health had been poor since the death of her husband. On the day the deed was signed her condition was so alarming that some of her children, who were at a distance, in other parts of the state, were sent for, and a justice of the peace was called in during the forenoon, and the deed was produced, signed by the grantor, without reading, and her acknowledgment taken by the justice. Before signing it she asked if there was any way she "could fix it so Hattie could have a little something, if she needed it." The justice said that he did not know. Defendant Charles Murfield was present. He was the executor of his father's estate, and evidently had much influence with his mother. After the justice answered his mother, he spoke, and said that he "didn't want any more sales; that he wanted it to stand as his father had it." His

1. DEED: undue
influence.

Miller v. Murfield.

mother then said she did not want any more trouble, and signed the deed. It is shown that there was much ill feeling on the part of some of the defendants, especially the brothers, towards the husband of plaintiff. Charles had been especially bitter towards him. Less than three weeks before the deed was executed, the plaintiff and her husband had visited the mother. Charles was present, and used harsh language towards the husband, in effect, ordering him away. The mother interfered in behalf of Miller. Other facts are shown, which indicate that some of the defendants, and especially Charles, were active in trying to prevent plaintiff from receiving a share of her mother's estate. It appears quite clearly that the mother desired to make some provision for plaintiff, but that she was induced to yield to the desires of Charles and others, to avoid trouble, and her condition at the time was so feeble that she was easily influenced. It is said that the recitations in the deed show that it was the mother's desire and intent to carry into effect the wishes of her late husband, and that other circumstances and declarations of the mother, made at a subsequent date, corroborate the recitals of the deed. But when the deed was executed, and from that time until her death, she was constantly subjected to influences adverse to giving to plaintiff any property, on account of hostility to her husband. It does not appear that she knew the full contents of the deed, for it was not read to, nor by, her, so far as is shown, while there is evidence that it was not so read, and it seems to have been prepared by some interested person at least a week before. We think the claim of appellant, that the deed was obtained by fraud and undue influence on the part of defendants, is sustained, and that it was rightly set aside by the court below. We do not find that all the defendants are equally culpable, but the improper influences exerted by some will necessarily bar all from deriving anything from the deed.

II. It is urged that the deed of April 22, 1886, from J. S. Murfield, operated to convey title to a part

Edgerton v. Edgerton.

2. —: no delivery. of the lands in controversy. There is no evidence that the deed was ever delivered.

It appears to have been in due form, and to have been properly signed and acknowledged. It bears the same date as the will of J. S. Murfield, and was found with it, in the same envelope, after his death. It does not appear that the grantee knew of the existence of the deed until after the death of his father, while it is shown that he had rented the farm and was a tenant after the date of the deed, and that he paid rent to the estate. It is evident that the deed was never delivered, so far as is shown, and that no title passed thereby. *Otto v. Doty*, 61 Iowa, 26.

III. The pleadings raise an issue as to the effect of the limitations attempted in the codicil of the will of J. S. Murfield, on the interest in real estate devised to Elizabeth, in that part of the will first executed, but, since nothing is claimed under it in argument for appellants, we will not further consider it. We are satisfied with the decree of the district court, and it is therefore

AFFIRMED.

EDGERTON V. EDGERTON.

DIVORCE: INHUMAN TREATMENT: EVIDENCE. In an action by a wife for a divorce on the ground of inhuman treatment, where the evidence showed many unseemly contentions between the parties, and that they were both more or less in fault, but fell far short of showing such inhuman treatment as to endanger plaintiff's life, held that a divorce was properly denied.

Appeal from Warren District Court.—HON. J. H. HENDERSON, Judge.

FILED, JANUARY 24, 1890.

ACTION for divorce and alimony upon the alleged ground of inhuman treatment endangering life. The case was tried to the court, and, after hearing all the testimony offered on behalf of the plaintiff, and the testimony of the defendant in his own behalf, the court declined to hear further testimony on the part of the

 Irwin v. Burdick.

defendant, and decreed that the bill of the plaintiff be dismissed; that the plaintiff pay a designated part of the costs; and that the defendant pay the balance. The plaintiff appeals.

H. McNeil, for appellant.

McGarry & Brown and *W. F. Powell*, for appellee.

GIVEN, J.—These parties were married in April, 1884, she being then twenty-six years of age, and he forty-four. They lived together as husband and wife until April, 1887, when she left his home. Unseemly contentions and disputes arose between them early in their married life, and continued to disturb their peace and comfort as long as they remained together. The cause of contention that led to the most serious differences was as to the proper manner of caring for their infant child. Each, with but little, if any, corroboration, and generally with direct contradiction, accused the other of many improper acts, and each testifies to having been threatened with violence from the other. The nature and causes of their contentions are very appropriately summed up by the appellant in her testimony, when, in response to questions by the court, she stated: "I suppose we are both to blame in these little spats and quarrels. I don't say as I was to blame, and don't say as he was all to blame, of course; no, sir. I would not say that; I don't want to tell a story if I know it." The testimony fully supports this statement that both were to blame, but it falls very far short of sustaining the charge of inhuman treatment endangering life. The decree of the district court is

AFFIRMED.

79	69
79	73
79	69
81	196

IRWIN V. BURDICK.

Tax Sale and Deed: NOTICE TO REDEEM: PERSON TO WHOM LAND IS TAXED. Where land sold for taxes is taxed to an unknown owner when the notice to redeem, required by section 894 of the Code, should be given, no notice is required. (See opinion for citations.) And where, at the time for giving such notice, the land was taxed to an unknown owner, but the holder of the tax-sale certificate

Irwin v. Burdick.

had paid the taxes, and the treasurer, after his custom, had entered his name opposite the description of the land in the tax list, in the column of owners' names, this did not amount to a taxation of the land to him, and he was not required to serve notice upon himself of the expiration of the time for redemption, in order to make valid his tax deed for the land.

Appeal from O'Brien District Court.—HON. SCOTT M. LADD, Judge.

FILED, JANUARY 24, 1890.

ACTION to quiet title to certain lands in O'Brien county. Judgment for defendant, and plaintiff appeals.

H. E. Long, for appellant.

Warren Walker, for appellee.

GRANGER, J.—The premises in controversy are the southeast quarter of the southwest quarter of section 5, in township 97 north, of range 40 west, in O'Brien county. The stipulated facts show the plaintiff to have been the fee-title owner of the land, and that the title should be quieted in him, unless he has been divested of it by a tax-title deed to the grantors of the defendant. The record evidences two sales of the land for taxes, the first being December 22, 1867, for the taxes of 1858 and 1859; and the second on the fifth day of October, 1874, for the taxes of 1872 and 1873. By mesne conveyances the defendant is the owner of the title resulting from either sale; and, if either tax deed is valid, his title is good. With our view of the case, it is only necessary to consider the validity of the deed resulting from the sale of October 5, 1874.

In argument but a single objection is made to the validity of this deed; and that objection goes to the question of a proper notice under the provisions of section 894 of the Code, being that required for the expiration of the time for redemption. The section provides that before a tax deed shall issue the holder of the tax-sale certificate shall cause a notice to be served upon the person in whose name the land is taxed of the time when the right of redemption will expire. It has

Irwin v. Burdick.

been held, and is the law, that when land is taxed to an unknown owner no notice is required under the provisions of the section cited. *Walker v. Town-Lot Co.*, 65 Iowa, 563; *Fuller v. Armstrong*, 53 Iowa, 683; *Tuttle v. Griffin*, 64 Iowa, 455; *Parker v. Cochran*, 64 Iowa, 757. In this case, on the fifth of October, 1874, the tax-sale certificate was held by, and the tax deed issued to, one James H. Easton, and it is appellant's contention that the notice referred to should have been served on James H. Easton; and hence we might be confronted with the novel question, if the law contemplates that a party shall cause a notice to be served upon himself. In fact, it is the precise point urged and resisted in this case; and appellant is supported in his position by the case of *Slyfield v. Healy*, 32 Fed. Rep. 2. Without, by this reference, committing ourselves to any view of that question, we think this case may be disposed of on a different theory as to the facts.

Appellant bases his claim that the notice should have been served on Easton on the assumption that the land was taxed to him. In this, we think, he is mistaken as to the facts; and, for its determination, let us look to the record. The facts are all by stipulation, and the thirteenth is as follows: "(13) That said real estate always had been wild and unoccupied prairie land, in the actual possession of no one, up to the time possession was so taken by said Anna Dakin; and that the same was assessed by the assessor to 'unknown owners' for the years up to the time that defendant took actual possession thereof, and was not otherwise taxed except as herein stated." The statement making the exception referred to at the close of the stipulation is stipulation number 9, in the following words: "(9) That the tax lists for the years 1874, 1875 and 1876 were then in the hands of the treasurer, and showed, in the columns marked 'Names of owners,' the name of James H. Easton marked therein opposite the tract of land in controversy; that the treasurer will testify that when he received the tax lists no name was written

Irwin v. Dakin.

therein, but, when said tax was paid, he, in accordance with his custom, marked the name of James H. Easton therein, and so, and not otherwise, said name was made to appear in said tax lists of 1874, 1875 and 1876, when said notice was given; and that at said time said tax list for 1877 was blank. And plaintiff has no evidence to dispute the foregoing, but objects to it as immaterial." Stipulation number 8 is as follows: "(8) That the tax list for the year 1877, under heading of 'Names of owners,' was at that time blank." What is the legitimate inference, from this record, as to the land being taxed to Easton? The parties, while not in terms stipulating one fact, have stipulated the evidence from which such fact alone can be found; and in an equity cause it is proper for us to find the fact. With the fact established, as in effect testified to by the treasurer, it is conclusive that the land was not taxed to Easton. The lands were each year taxed to "unknown owners," and at the time of the payment of taxes the name of Easton was placed in the column of names merely as a result of a custom of the treasurer. To necessitate the notice, the lands must have been taxed to Easton, and not because, after the tax was paid, his name was placed in the column for convenience. With the facts thus found, we do not understand that there is, or could well be, a controversy as to the legal *status* of the case. The judgment of the district court is

AFFIRMED

IRWIN V. DAKIN.

Tax Sale and Deed: NOTICE TO REDEEM: PERSON TO WHOM LAND IS TAXED. *Irwin v. Burdick, ante*, p. 69, followed.

Appeal from O'Brien District Court.—HON. SCOTT M. Ladd, Judge.

FILED, JANUARY 24, 1890.

Short v. The Chicago, M. & St. P. Ry. Co.

ACTION to quiet title. Judgment for defendant, and the plaintiff appeals.

H. E. Long, for appellant.

Warren Walker, for appellee.

GRANGER, J.—This cause was submitted with and upon the record in the case of *Irwin v. Burdick*, ante, p. 69, and, following the conclusions announced in that case. the judgment in this is AFFIRMED.

79	73
85	411
79	73
106	149

SHORT V. THE CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY.

1. **Appeal: BILL OF EXCEPTIONS FILED TOO LATE.** Where sixty days were allowed defendant within which to file a bill of exceptions, but none was filed until long after the expiration of that time, when one was filed by leave of court, and when a certified record of the evidence was also for the first time filed, *held* that a motion to dismiss the appeal should be sustained, at least so far as to strike from the record what purports to be the evidence. (Compare *Deering v. Irving*, 76 Iowa, 519.)
2. ———: **INSTRUCTIONS: EVIDENCE WANTING: PRESUMPTION.** This court will presume that an instruction given by the trial court was justified by the evidence, where the evidence is stricken from the record.

Appeal from Pottawattamie District Court.—HON.
GEORGE CARSON, Judge.

FILED, JANUARY 24, 1890.

THE plaintiff claims to be the owner of a lot in the city of Council Bluffs: and, she brought this action against the defendant to recover the damages which she alleges she sustained by reason of the laying down of railroad tracks partly on the street adjacent to said lot, and partly upon said lot. The defendant answered the petition by a general denial. There was a trial by jury, which resulted in a verdict and judgment for the plaintiff for one hundred dollars. Defendant appeals.

Wright, Baldwin & Haldane, for appellant.

D. C. Bloomer and Flickinger Bros., for appellee.

ROTHROCK, C. J.—I. It appears from what is claimed to be an abstract of the record that the case was tried upon the oral testimony of witnesses, and a claim of defendant that it was authorized to do the acts complained of by virtue of a written contract made between the defendant and the Kansas City, St. Joseph and Council Bluffs Railroad Company. The judgment appealed from was rendered on the thirtieth day of June, 1888; and the judgment entry contained the following clause: "The defendant is to have sixty days in which to file a bill of exceptions herein." No bill of exceptions was filed within the sixty days, and no action was taken by defendant during that time for an extension of the time within which to file exceptions.

The plaintiff moves to dismiss the appeal because of the failure to perfect the record within the time fixed by the court. In resistance of this motion it is made to appear that on the first day of October, 1888, the defendant filed a motion in the court below for leave to file a bill of exceptions as of the twenty-eighth day of August, 1888. The motion was heard; and on the thirteenth day of April, 1889, the court sustained the same so far as to allow the defendant to file the bill of exceptions as of that date, and the motion was otherwise overruled. On the same day the defendant filed in open court a duly-certified record of the evidence. It may be conceded that if this certified record had been filed within the time fixed by the court it would have been sufficient as a bill of exceptions. But it was not filed within sixty days from the date of the judgment, nor until more than seven months after the time fixed by order of the court; and the court refused to make a *nunc pro tunc* order in the premises. Whether it is allowable to permit the time fixed for filing the bill to expire and then to obtain a *nunc pro tunc* order

1. APPEAL: bill
of exceptions
filed too late.

The State v. Grossheim.

upon a motion for that purpose, we need not determine in this case, because no such order was made by the court below. The motion to dismiss must be sustained, so far at least as to strike what purports to be the evidence from the record. See *Deering v. Irving*, 76 Iowa, 519.

II. It is claimed, however, that the judgment should be reversed for error in the instructions given by the court to the jury. The instructions are claimed to be inconsistent and contradictory. Whether they are vulnerable to the objection, when considered in connection with what is claimed to be the evidence in the case, we cannot determine. The court instructed the jury that the defendant would be liable even if it obtained a lease from the Kansas City Company. We cannot determine the correctness of this instruction. It involves a construction of the lease referred to, and we will presume that it was properly construed by the court. We think the judgment must be

AFFIRMED.

THE STATE V. GROSSHEIM.

1. **Criminal Law: TRIAL BY JURY OF ELEVEN: CONSENT: LEGALITY.**
Where, after a trial for a felony has begun to a jury of twelve men, one of them becomes sick, the defendant may, with the consent of the state and the court, waive a jury of twelve men, and agree that the trial shall proceed with the eleven jurors, and that their verdict shall "be as valid and binding as though rendered by a full jury," and a verdict of guilty and judgment thereon cannot afterwards be questioned on the ground that the jury was not full. (*State v. Kaufman*, 51 Iowa, 578, followed.)
2. **Rape: ASSAULT WITH INTENT: CORROBORATION OF PROSECUTRIX.**
The provision of section 4560 of the Code, that a defendant cannot be convicted of rape upon the testimony of the prosecutrix alone, unless corroborated by other testimony tending to connect him with the commission of the offense, does not apply to the crime of assault with intent to commit rape. (Compare *Rogers v. Winch*, 76 Iowa, 546.)

79	75
79	740
79	75
90	58
79	75
92	488
79	75
106	486
106	685
79	75
132	467

The State v. Grossheim.

3. ——— : ——— : CONSENT : AGE OF FEMALE. Under the law, a female under the age of thirteen years is not competent to consent to sexual intercourse, nor can she consent to an assault for that purpose. (See opinion for citations.) Accordingly, in a prosecution for attempting to rape a girl of eleven years, *held* that the court properly refused to instruct that “an attempt to have sexual intercourse with a female, whether under or over the age of consent as fixed by law, when made with the consent of such female, and unaccompanied by violence, does not include an assault.”
4. ——— : ——— : PRESUMPTION FROM ACTS : INSTRUCTION. In such case the court instructed : If you find from the evidence that the defendant took hold of the prosecutrix, and that he disarranged or removed her clothing so as to expose her person, and also opened his own clothes and exposed his private parts, and then, while he was lying down, he drew the prosecutrix down upon his person, then from these facts you are instructed the law would presume an intent on the part of said defendant to have sexual intercourse with the said prosecutrix.” *Held* that the instruction did not state that such presumption would be conclusive, and that, so understood, it was correct.
5. ——— : ——— : INDICTMENT. The indictment in this case (for an assault with intent to rape) is objected to on the ground that it charges an assault by force and against the will of the person assaulted, whereas, in law she had no will, being under the age of consent. But *held* that the objection was not well taken. (Compare *State v. Newton*, 44 Iowa, 45.)
6. **Appeal : REVIEW OF INSTRUCTIONS : EVIDENCE WANTING.** Complaint that the court erred in giving and refusing instructions cannot be considered in the absence of the evidence necessary to determine the questions thus raised.

Appeal from Muscatine District Court.—HON. C. M. WATERMAN, Judge.

FILED, JANUARY 24, 1890.

DEFENDANT was convicted of the crime of assault with intent to commit rape, and sentenced to imprisonment in the penitentiary for the term of five years. He appeals.

D. C. Cloud and Jayne & Hoffman, for appellant.

John Y. Stone, Attorney General, for the State.

ROBINSON, J.—The indictment charges that the assault in question was made upon a female of the age

The State v. Grossheim.

of eleven years, with intent to wilfully, unlawfully and feloniously ravish and carnally know her, by force and against her will. The defendant pleaded not guilty.

I. A jury of twelve men was impaneled, and the trial of defendant commenced. On the second day of the trial one of the jurors was excused on account of his serious illness, and, with the consent of defendant, duly entered of record, the trial proceeded under an agreement, also made of record, that the verdict of the eleven jurors should "be as valid and binding as though rendered by the full jury." Judgment was rendered on the verdict of eleven jurors. Appellant insists that he was not tried and convicted by a legal jury, and cites the cases of *State v. Carman*, 63 Iowa, 130, and *State v. Larrigan*, 66 Iowa, 426, as supporting the principle for which he contends. Those cases are authority for the rule that a jury cannot be waived in a criminal case, for the reason that the statute provides that issues of fact in such cases shall be tried by jury. The essentials of a legal jury were not considered. But it is said that the constitution of the United States and the constitution of the state of Iowa contemplate a trial by a jury of twelve persons, and that a legal jury, in a case of this kind, cannot consist of a less number; therefore, that the case of *State v. Kaufman*, 51 Iowa, 578, should be overruled. The right of the defendant, with the consent of the court and state, to waive a jury of twelve men and accept the verdict of eleven, was fully considered in that case, and the conclusion reached was that it could be done. We are of the opinion that the decision is right, and are satisfied with the grounds upon which it rests.

II. The court refused an instruction asked by defendant, to the effect that he could not be convicted of the crime charged on the testimony of the person alleged to have been injured, unless she was corroborated by other evidence tending to connect him with the commission of the offense. Section 4560 of the Code requires such

1. CRIMINAL
law: trial by
jury of
eleven: con-
sent: legality.

2. RAPE: as-
sault with in-
tent: corrob-
oration of
prosecutrix.

The State v. Grossheim.

corroboration in prosecutions for rape, and defendant contends that, inasmuch as the crime of assault with intent to commit rape is of the same nature, differing only in being of a lower degree, the same rule should apply. The question thus raised was referred to, but not decided, in *State v. McIntire*, 66 Iowa, 341. See, also, *Rogers v. Winck*, 76 Iowa, 546. The crime of rape is punishable by imprisonment in the penitentiary for life or any term of years. Code, sec. 3861. The crime of assault with intent to commit rape is punishable by imprisonment in the penitentiary for a term not exceeding twenty years. Code, sec. 3873. They are recognized and treated by the statute as distinct offenses. Section 4560 refers to but one of them, the crime of rape, and cannot be extended to include both. The instruction in question was therefore properly refused.

III. Appellant asked the following instruction, which was refused: "The crime of rape or attempt to commit rape, when accompanied with
 3. —: —: consent: age violence and against the will and consent of
 of female. the person ravished or assaulted, includes necessarily an assault. But an attempt to have sexual intercourse with a female, whether under or over the age of consent as fixed by law [thirteen years], when made with the consent of such female, and unaccompanied by violence, does not include an assault." Under the law a female under the age of thirteen years is not competent to consent to sexual intercourse, nor can she consent to an assault for that purpose. 2 Bish. Crim. Law, sec. 1091; *People v. McDonald*, 9 Mich. 150; *Hays v. People*, 1 Hill, 351.

IV. The seventh paragraph of the charge is as follows: "If you find from the evidence that the defendant took hold of the prosecutrix, and
 4. —: —: presumption that he disarranged or removed her clothing
 from acts: so as to expose her person, and also opened
 instruction. his own clothes and exposed his private parts, and that then, while he was lying down, he drew the prosecutrix down upon his person, then from these facts you are

The State v. Grossheim.

instructed the law would presume an intent on the part of said defendant to have sexual intercourse with the said prosecutrix." The presumption specified was not conclusive, but might be overcome by evidence or circumstances which would show that it was not well founded. But, in the absence of something to show that defendant did not intend to have sexual intercourse with the prosecutrix, the fair inference from the acts described would be that he intended to have it. That would be the natural result of such acts, and the one he must be presumed to have intended, in the absence of a showing to the contrary.

V. It is contended that the indictment is defective in that it charges an assault by force and against the will of the person assaulted, whereas, in
 5. —: —: indictment. law she had no will, and the real offense complained of was an attempt to carnally know and abuse a female child under the age of thirteen years. The indictment is substantially like that in *State v. Newton*, 44 Iowa, 45, which was held to be sufficient, and to charge the crime of assault with intent to commit rape.

VI. Appellant claims that the court erred in giving certain other portions of its charge, and refusing to give
 6. APPEAL: review of instructions: evidence wanting. certain other instructions asked. The evidence submitted on the trial was not preserved by bill of exceptions, and no attempt has been made to present it to us.

The correctness of some of the rulings questioned depended upon the evidence in the case, and cannot now be determined by us. So far as we can ascertain from the records, all material and proper instructions asked were substantially incorporated in the charge. We do not discover any error in the record which could have prejudiced the defendant. The judgment of the district court is

AFFIRMED.

79	80
81	564

79	80
84	529

79	80
97	95
99	294

79	80
111	630

79	80
112	14

79	80
116	248

79	80
121	669

CARRIER V. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

HIXON *et al.* v. THE SAME.

BLACKWOOD v. THE SAME.

LOUNSBURY v. THE SAME.

JAUGHN v. THE SAME.

1. **Statute of Limitations: CARRIERS: UNREASONABLE CHARGES: ACTIONS BASED ON FRAUD.** The provision of section 2530 of the Code, that in actions for relief on the ground of fraud the cause of action shall not be deemed to have accrued, for the purposes of the statute of limitations, until the fraud shall have been discovered, refers to the fraud named in the preceding section—that is, such as was “heretofore solely cognizable in a court of chancery.” Accordingly *held* that actions at law for the recovery of unreasonable charges exacted by a carrier for the transportation of property, not being actions “heretofore solely cognizable in a court of chancery,” accrued when the charges complained of were exacted and paid, and not when the fact was discovered that they were unreasonable and in excess of the charges made to other shippers from the same place. (See opinion for citations.)
2. ——— : **EXCEPTION: FRAUDULENT CONCEALMENT OF RIGHT OF ACTION: APPLICATION OF RULE.** The rule announced in *District Twp. of Boomer v. French*, 40 Iowa, 601, that where the party against whom a cause of action exists in favor of another, by fraud or actual concealment prevents such other from obtaining knowledge thereof, the statute of limitations will only commence to run from the time the action is discovered, or might, by the use of diligence, have been discovered, is reviewed and adhered to; and in these cases, which are actions to recover freight charges exacted by defendant and paid by plaintiffs in excess of the charges habitually exacted by defendant of other shippers in like cases, it appearing that defendant fraudulently concealed from plaintiffs the fact of the discrimination, *held* that the actions did not accrue, nor the statute of limitations begin to run against them, until that fact was discovered.

Appeal from Jasper District Court.—HON. W. R. LEWIS, Judge.

FILED, JANUARY 25, 1890.

THESE several cases, involving the same questions, are submitted together. They are actions to recover back part of money paid by the plaintiffs, respectively, to the defendant, at different times, as freight charges on carloads of cattle shipped by plaintiffs from Jasper county, Iowa, to Chicago, Illinois. Each petition contains several counts, aggregating twenty-eight hundred and twenty-six; each count stating a separate cause of action in substantially the same terms, except as to the dates of shipment. The count set out in the abstract alleges that defendant is a common carrier; that, from January, 1879, to 1887, plaintiff was engaged in buying and shipping live stock from Jasper county, Iowa, over defendant's line of railway, to the Union Stock-Yards, at Chicago, Illinois; that on the fifth day of April, 1880, he shipped from Jasper county, over defendant's road, a car of cattle; that, for some months before and after date of said shipment, the usual tariff rate per car charged by defendant for transportation of live stock, per carload, over its line of railroad, from any point in Jasper county, Iowa, to the Union Stock-Yards, Chicago, was sixty dollars; that the defendant charged, and plaintiff paid, at the time of said shipment, the full tariff rate; that during the time of said shipment, and for a long time prior thereto, and after the said shipment, there were firms and individuals named, and others who were not known to the plaintiff, engaged in the same business as plaintiff; that during the time of said shipment the defendant gave and allowed to each and every one of said firms and individuals a drawback or rebate from the tariff rate, the exact amount of which is unknown to plaintiff, but is by him believed and averred to be seventeen dollars for each and every car shipped by any of them from any point in Jasper or Polk counties, Iowa, to Chicago, Illinois, so that, in effect, the tariff rate or freight per car charged by defendant and paid by plaintiff was seventeen dollars

per car more than the tariff rate or freight per car charged by defendant and paid by any other of said firms or individuals; that said drawback or rebate of the freight charges above set forth, granted and allowed by defendant, was accepted by each and every one of said firms and individuals, and that under said drawback or rebate the said firms and individuals did actually ship cars from and to the same point that plaintiff shipped them, as herein set out, and said shipments were made at and about the same date as plaintiff's shipments; that said drawbacks and rebates so granted by defendant to said firms and parties in effect reduced the freight or tariff rate per car seventeen dollars less than was charged by defendant and paid by plaintiff for the same service, that the said shipments made by plaintiff as herein set forth were from the same place, upon like conditions, and under similar circumstances, as the shipments made by said parties and firms above mentioned, and upon which the rebate, drawback and concessions of freight charges were allowed by defendant and accepted by said parties and firms separately, and the service rendered by defendant to plaintiff in the shipment herein set out was precisely the same and like service as it rendered the other parties and firms; that, by reason of the shipment made by plaintiff being for the same and like service, from the same place, upon like conditions, and under similar circumstances, as the shipments made by other parties, and there being a difference in the tariff rate per car of seventeen dollars charged and paid by plaintiff and the rate charged and paid by any of said other parties, the plaintiff avers that the rate charged and paid by plaintiff is and was unreasonable, and is and was an unjust discrimination.

And the plaintiff further avers that the rebate, concession and drawback herein complained of and charged to have been allowed by defendant to said other firms and parties was not known to plaintiff till shortly before the beginning of this suit, and the extra rate charged by the defendant was paid by plaintiff in ignorance of

Carrier v. The Chicago, R. I. & P. Ry. Co.

the real rate charged and paid by the other parties. The plaintiff further says that the defendant openly promulgated, announced and published its tariff rate per car for transportation of live stock to Union Stock-Yards, Chicago, Illinois, from every point or station upon its line of railway in Iowa ; that the station agents at all stations in Iowa openly announced and declared said published and announced tariff rates to be correct, and that no cut, rebate or concession from the same was allowed, and that plaintiff believed and relied upon said statements ; that the rebates and concessions of said freight charges were a private and secret arrangement between the defendant and said shippers, and the knowledge of such rebates or concessions was by the defendant wrongfully and fraudulently withheld from plaintiff, and was wrongfully and fraudulently concealed from plaintiff by the defendant, and the shippers so favored with rebates or drawbacks were pledged and bound, under solemn promise, to reveal it to no one, and it never was by them revealed ; that plaintiff never knew of such rebates or concessions till about May, 1888, and by no means in his power could have discovered it ; but, believing in the averred public and published freight-tariff, paid the full charge thereof, not knowing of the fraudulent and dishonest and concealed rebate given as a favor by the defendant to said shippers who were at the time in competition with the plaintiff.

. Plaintiffs further say that they and each of them separately, at different times, and as often as four times in each of the years 1880 to 1884, inclusive, asked and ought of the defendant whether rebates or drawbacks were allowed or given or paid, as herein complained of; that said inquiries were oral, and were addressed to and answered by the defendant's station agents at Newton, the general freight agent at Chicago, and the Iowa stock agents at Des Moines; that said answers, uniformly, were that no rebates, drawbacks or freight concessions were given or allowed from the usual tariff rate to any one;

that all shippers were treated exactly alike, and, if any rebate or drawback ever was granted or paid to any one, a like amount would be granted and paid on every shipment of plaintiff's; that said answers were false, and so known to said officers, and each of them, at the time it was told, and was so told with intent to defraud and deceive plaintiff, and to prevent him from acquiring knowledge of the existence of the cause of action set forth in this count, and that plaintiff relied upon said false representations; that said inquiry and false answers were made both before and after the shipments were made, and by it the plaintiff was induced to and did pay the money herein alleged; that the plaintiff, so believing, was deceived by said false answers, and was thereby prevented from acquiring knowledge of the existence of the cause of action set up in this count; that, had the truth been told, the knowledge of said cause of action would have come to plaintiff, and this action would have been brought, long before the period of five years from the time of the shipment herein set out; that, had the truth been told, the plaintiff would not have paid out his money; that said plaintiff has been damaged by the unjust, unreasonable and extortionate rate charged by the defendant and paid by plaintiff as aforesaid, and on account of the unjust discrimination as aforesaid, in the sum of ninety dollars, no part of which has been paid, or in any way satisfied, to the plaintiff.

The defendant demurred to twenty-one hundred and sixty-six of these counts, for the following reasons: (1) Said counts, and each of them, show on their face that the cause of action in each count is barred by the statute of limitations; (2) said counts, and each of them, show that the cause of action therein set out accrued to plaintiff or his assignor more than five years prior to the commencement of this action, to-wit, more than five years prior to April 24, 1888; (3) said counts do not, nor do either of them, show any fraud as the basis of said action or otherwise, heretofore solely cognizable in equity; (4) said counts do not, nor do either of them, show any

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concealment of said alleged cause of action, such as in law defeats or stops the bar of the statute. The demurrers were overruled, and, the defendant electing in each of said causes to stand on the demurrer as to the several counts demurred to, the court rendered judgments against the defendant for the amount covered by the several counts, to all of which defendant, in each case, at the time excepted, and from which it appeals to this court, assigning as error the overruling of said demurrers and rendering said judgments.

Thos. S. Wright and Winslow & Varnum, for appellant.

A. Clark, for appellees.

GIVEN, J.—I. When these causes of action are alleged to have accrued, there was no statute, state or national, fixing rates, nor providing for equality of rates; hence the right of the plaintiffs to maintain such actions must be determined by the common law. It is not questioned but that at common law a common carrier was only entitled to charge reasonable rates, and was liable to an action for unreasonable charges. The counts demurred to show that the alleged causes of action accrued more than five years before the bringing of these actions. The sole question presented in the record and arguments is whether the counts contain such allegations as take the cases out of the provisions of paragraph 4, section 2529, Code, limiting the bringing of actions “founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud, in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years” after the causes accrue. Section 2530, Code, provides that in actions for relief on the grounds of fraud or mistake, and in actions for trespass to property, the cause of action shall not be deemed to have accrued until the

1. STATUTE of limitations : carriers : unreasonable charges : actions based on fraud.

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fraud, mistake or trespass complained of shall have been discovered by the party aggrieved. The fraud here contemplated is that defined in the preceding section, to-wit, such as was heretofore solely cognizable in a court of chancery. *Gebhard v. Sattler*, 40 Iowa, 152; *Brown v. Brown*, 44 Iowa, 349; *Phœnix Ins. Co. v. Dankwardt*, 47 Iowa, 432; *Higgins v. Mendenhall*, 51 Iowa, 141. These are law actions, and clearly not such as were heretofore solely cognizable in a court of chancery, and therefore not within this exception to the general statute of limitation.

II. It is not contended that they are within any of the other expressed exceptions to the general statute; but appellees rely upon the rule laid down in *District Twp. of Boomer v. French*, 40 Iowa, 601, and cases cited as approving and following that case. That was an action to recover moneys alleged to have been received by the defendant French, as treasurer of the plaintiff township, and appropriated to his own use. The petition alleged that at the close of his term a partial settlement was had with the defendant, but, by means of false and fraudulent entries in his books as treasurer, and by means of fictitious entries and corrupt and fraudulent concealments and misrepresentations, the defendant kept from the plaintiff's knowledge the fact of the receipt of said sum until October, 1883, and plaintiff had no knowledge of the facts, or of the gross frauds perpetrated by defendant, till said date. The petition showing that the action was not brought within three years, defendant demurred, on the ground that the action was barred. The demurrer was sustained, and plaintiff appealed. This court, after citing Code, section 2530, says: "This action does not come within the language or meaning of the section quoted, for the reason that the action is not for relief on the ground of fraud, but on the ground that the defendant failed to pay over money received by him. The cause of action does not grow out of the fraud alleged. It existed independent of the fraud. Under the provisions of the

2. — : excep-
tion : fraudu-
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section quoted above, the fact that the plaintiff, by reason of the fraud of the defendant, failed to discover the cause of action, does not defeat the bar of the statute. That is defeated, by the terms of that section, only where the cause of action is grounded in fraud."

There is some contention as to whether these actions are for unreasonable charges and unjust discriminations, or for unreasonable charges only. Mere discrimination, without injury, would not be actionable. When the discrimination is by charging unreasonably, it is the unreasonable charge that is the ground of the action. The ground of the action against French was his failure to pay the money received; the ground of these, the defendant's failure to pay back the money charged and received in excess of what was reasonable. In each case the plaintiffs have a cause of action independent of the frauds alleged. These cases, like that of *District Township v. French*, measured by the statute alone, are clearly barred; but in that case this court held the rule to be that, "where the party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment prevented such other from obtaining knowledge thereof, the statute would only commence to run from the time the right of action was discovered, or might, by the use of diligence, have been discovered." Appellant contends that these cases are distinguishable from that; that French occupied a fiduciary relation towards the township, by virtue of which it was his duty to disclose the truth, and especially not to deceive, while such was not the legal duty of this defendant. The defendant is a *quasi* public corporation, owing certain duties to the public; and, in the absence of statute, fixed its rates without other restriction than that they should be reasonable. It was said in *Heiserman v. Railway Co.*, 63 Iowa, 736, that "railroad companies are public carriers, and those who employ them are in their power, and must bow to the rod of authority which they hold over consignors and consignees of property transported by them." The reason for the rule requiring disclosures and fair dealing

applies to this defendant with the same force that it did to French.

III. Appellant contends that when exceptions are provided to a general statute it excludes all others than those expressed, and that the courts are not at liberty to ingraft other exceptions than those expressed upon such a statute. This claim finds strong support in the following cases, cited by counsel: *Bank v. Kissane*, 32 Fed. Rep. 429; *Engel v. Fischer*, 7 N. E. Rep. 300; *Fee v. Fee*, 10 Ohio, 470; *Amy v. Watertown*, 22 Fed. Rep. 418; *Bank v. Dalton*, 9 How. 526; *Kendall v. United States*, 107 U. S. 125, 2 Sup. Ct. Rep. 277; *Favorite v. Booher's Adm'r*, 17 Ohio St. 554; *Woodbury v. Shackelford*, 19 Wis. 65; *Freeholders v. Veghte*, 44 N. J. Law, 509; *Demarest v. Wynkoop*, 3 Johns. Ch. 143; *Miles v. Berry*, 1 Hill (S. C.) 296; *Troup v. Smith*, 20 Johns. 33. These precise questions were presented and passed upon in a number of those cases, and the doctrine announced that the general statute was an exclusion of all others, and that when the legislature has made exceptions the courts can make none, as that would be legislation. Several decisions by this court are also cited in support of these propositions. In *Campbell v. Long*, 20 Iowa, 382, the questions were as to the extension of time granted to minors, and whether ignorance of a right would prevent the operation of the statute. The court says that "but for the exception in the statute it would run against minors and adults alike, and courts are not at liberty to ingraft upon the statute exceptions which the legislature did not deem necessary." "No fraud is charged upon defendants." It was simply a question whether ignorance of a right would prevent the running of the statute. In *Shorick v. Bruce*, 21 Iowa, 307, the court says: "The thought that the statute would not run because Wilson, the ward, was a person of unsound mind or incapacitated to sue, finds no support either in the statute or in the rules of the common law." In *Relf v. Eberly*, 23 Iowa, 469, the question was whether plaintiff's case, as made by his petition, was, prior to the statute, and,

within its meaning, solely cognizable in a court of chancery. Speaking with reference to this question, the court says: "Our opinion, therefore, is that in cases of fraud, when the plaintiff's remedy is concurrent,—that is, when he could have the same relief either at law or in equity,—the action must be commenced within five years after the perpetration of such fraud, and that he could not sue within that time after the discovery." The question under consideration was not noticed in that case, and the same is true of *Gebhard v. Sattler*, 40 Iowa, 152. In *Miller v. Lesser*, 71 Iowa, 147, the question was whether the fact that the defendant changed his name, and that his place of residence was unknown to plaintiff, would prevent the running of the statute. The right of the courts to apply exceptions recognized at common law, other than those named in the statute, was not directly in question in either of these cases; and neither of the exceptions sought to be applied are such as were recognized at common law.

IV. *District Twp. v. French* finds strong support in the authorities cited in the opinion. Reference to *Sherwood v. Sutton*, 5 Mason, 143, wherein Judge STORY reviews many of the English and American cases, and to the cases cited by appellant, shows a diversity of rulings on this question by the courts of different states. It is true that some of the cases were under statutes that did not contain an exception as to actions for relief on the grounds of fraud, but the question was whether, in the absence of such an exception in the statute, the courts might apply it, just as in *District Twp. v. French*, the question was whether the court might apply the common-law exception announced, though not expressed in the statute. If the question was before us for the first time, we might hesitate to declare the rule announced in *District Twp. v. French*; but that case, sanctioned by a long line of respectable authorities, has stood unquestioned as the law of the state for many years, with several sessions of the legislature intervening, and has been cited, and

The State v. Benadom.

more or less directly followed and approved, in *Humphreys v. Mattoon*, 43 Iowa, 556; *Findley v. Stewart*, 46 Iowa, 655; *Brunson v. Ballou*, 70 Iowa, 34; *Bradford v. McCormick*, 71 Iowa, 129; *Wilder v. Secor*, 72 Iowa, 161; *Shreves v. Leonard*, 56 Iowa, 74. We think there is no sufficient reason for now reversing the conclusion announced in *District Twp. v. French*, *supra*.

It only remains to determine whether the plaintiffs' petitions alleged such fraud, or actual fraudulent concealment, by the defendant, as prevented them from obtaining knowledge of their causes of action within five years next preceding the commencement of these actions. It is alleged that plaintiffs were induced to and did pay the rates charged upon representations that they were the usual rates, and the same that were being charged to all others for the same service, and upon the promise that if any rebate was granted to any one a like amount would be granted to plaintiffs; that a less rate was being charged to the shippers named and others, which fact was fraudulently concealed from plaintiffs; that the representations were false, and known to the defendant's officers and agents making them to be so, and were made to prevent plaintiffs from acquiring knowledge of the fact that they were and had been charged and had paid unreasonable rates. Our conclusions are that the rule laid down in *District Twp. v. French* should be sustained, and that the allegations in the counts demurred to bring them within this rule, and that there was no error in overruling the appellant's demurrer.

AFFIRMED.

THE STATE V. BENADOM.

Intoxicating Liquors: DISPENSATION BY PHYSICIAN TO PATIENT: NUISANCE. A practicing physician has no right, by virtue of his profession, to dispense intoxicating liquors to his patients for the purposes of medicine, unless he holds a permit to deal in such liquors; and for so doing he is liable to indictment and punishment for nuisance the same as any other person.

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, JANUARY 25, 1890.

DEFENDANT was indicted and tried for the crime of nuisance. He was convicted, and adjudged to pay a fine of three hundred dollars and costs. From this judgment he appeals.

J. W. Jamison, for appellant.

John Y. Stone, Attorney General, and *F. O. Ellison*, County Attorney, for the State.

ROBINSON, J.—The evidence shows that defendant is a physician, authorized to practice medicine. There is some evidence tending to show that he sold intoxicating liquors contrary to law, but the questions involved in this appeal have been reduced to one, which is stated by counsel for appellant to be “whether a practicing physician in this state has the right to dispense as medicine, to a patient, in good faith, according to his needs, intoxicating liquors.” The question was raised, but not determined, in *State v. Cloughly*, 73 Iowa, 628. Chapter 75 of the Laws of 1880 was enacted to regulate the sale of medicine and poisons, and section 12 thereof contained the following: “This act shall not apply to physicians putting up their own prescriptions.” That provision was repealed by section 4, chapter 83, of the Laws of 1886, and the following was enacted in lieu of it, to-wit: “Physicians dispensing their own prescriptions only are not required to be registered pharmacists.” The claim of appellant seems to be that, since the acts of the general assembly relating to the practice of pharmacy provide for the sale of intoxicating liquors by pharmacists, and the provision quoted is found in one of those acts, it, in effect, constitutes physicians exceptions to the general rule, and authorizes them to sell intoxicating liquors to their patients,

if they are prescribed in good faith, for medicinal purposes. Section 1523 of the Code provides that "no person shall manufacture or sell, by himself, his clerk, steward or agent, directly or indirectly, any intoxicating liquors," excepting as thereafter provided. There is no provision excepting physicians from the effect of that section, unless it be that part of the act of 1886 which we have quoted. That does not in terms confer upon physicians the right to sell intoxicating liquors, even though prescribed by them as medicine. It should be construed in connection with section 2 of the same act, which provided that "pharmacists * * * shall have the sole right to keep and to sell, under such regulations as have been or may be established from time to time by the commissioners of pharmacy, all medicines and poisons, including intoxicating liquors, only for the actual necessities of medicine: provided, that such pharmacists shall have procured permits therefor, as hereinafter prescribed." The permits referred to were for the sale of intoxicating liquors. It may be conceded that the provision of section 4 of the act of 1886, quoted, authorized physicians who were not registered pharmacists to dispense their own prescriptions which contained medicines and poisons which registered pharmacists were authorized to keep and sell; but it did not authorize such physician to dispense intoxicating liquors, for the reason that registered pharmacists, as such, had not that right. Before they could acquire it, they were compelled to obtain permits, by complying with certain statutory requirements. But the act of 1886 was amended, and various portions of the statutes previously existing were repealed, by chapter 71 of the Laws of 1888. That provides that after it should take effect "no person shall * * * sell, keep for sale, give away, exchange, barter or dispense any intoxicating liquors, for any purpose whatever," otherwise than is provided in that act. It also provides that registered pharmacists may obtain permits by pursuing the method pointed out,

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and that holders of such permits shall "be authorized to sell and dispense intoxicating liquors for pharmaceutical and medicinal purposes, and alcohol for specified chemical purposes, and wine for sacramental purposes, but for no other purposes whatever." The language of the statute is plain. No one not holding a permit as therein provided has any right to sell or dispense intoxicating liquors for any purpose. Physicians not holding such permits are among those prohibited from selling and dispensing such liquors. The judgment of the district court is

AFFIRMED.

LADD V. OSBORNE *et al.*

1. **Injunction: TRESPASS: GROUND OF EQUITABLE JURISDICTION.** Where defendants falsely claimed that there was a highway across plaintiff's land, and repeatedly tore down his fences and passed over his premises, and threatened to continue to do so, *held* that equity would enjoin the repetition of the trespass, in order to avoid a multiplicity of suits, regardless of the solvency of the defendants, or other grounds of equitable interference. (See opinion for citations.)
2. **Riparian Rights: GOVERNMENT SURVEYS: MEANDER LINES.** In the government survey of lands bounded on one side by water, a meander line is not a boundary line, but is made for the purpose of ascertaining the quantity of land subject to sale in the tract. And where the government plat and field-notes show no reservation of land between the meander line and the water, the title of the patentee extends to the water. (See opinion for citations.)

Appeal from Greene District Court. — HON. J. H. MACOMBER, Judge.

FILED, JANUARY 25, 1890.

THIS is an action in equity by which the plaintiff seeks to restrain the defendants from opening fences upon plaintiff's land, and traveling across the same, upon a claim made by the defendants that there is a

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97	363
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107	497
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112	98
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133	440
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141	438

public highway over and upon the premises. There was a full hearing upon the merits, and a decree was entered for the plaintiff. Defendants appeal.

J. A. Gallaher and Timothy Brown, for appellants.

Head & Smith, for appellee.

ROTHROCK, C. J.—I. It is averred in the petition that the defendant W. D. Osborne “has unlawfully entered upon and travelled over the said premises, * * * and has thrown down, torn out and cut the fences surrounding the described premises belonging to your petitioner herein, although notified repeatedly to desist from so doing; that, in spite of the remonstrations of said plaintiff, the said defendant herein has continued to throw down, tear out and cut said fences, and travel over the said premises, belonging to said plaintiff, and has threatened to commit other and further trespasses on said real estate, and eject your petitioner from a portion thereof, to his annoyance and damage, and to the disturbance of his rights in and to said premises.” It is further averred in the petition that the defendant is insolvent, and that the injury which will result from the threatened acts of the defendant will be irreparable. Other persons were made parties defendant to the action by an amendment to the petition, but they were either members of defendant Osborne’s family or had no real interest in the controversy. The defense was made by W. D. Osborne alone.

It is claimed that the proof does not establish the fact that the defendant repeatedly opened the fences and traveled across the premises, and that it affirmatively appears that he is not insolvent, and that there is no ground for equitable interference by injunction for what was merely an action at law for trespass. The right to an action in equity, restraining the removal of fences and opening up highways, the cutting down of shade trees, or any other threatened invasion, use or occupation of the land of another, has been too long established in this state to be now called in question. In *City of*

1. INJUNCTION:
trespass:
ground of
equitable
jurisdiction.

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Council Bluffs v. Stewart, 51 Iowa, 385, it was said that "courts of equity will, under certain circumstances, interfere by injunction to prevent trespasses upon real estate; but to authorize such interference there must exist some distinct ground of equitable jurisdiction, such as the insolvency of the party sought to be enjoined, the prevention of waste or irreparable injury, or a multiplicity of suits." See, also, *Bolton v. McShane*, 67 Iowa, 207, and cases there cited. In the case at bar the evidence shows that there had been for some time contention between the parties as to whether a public road existed over plaintiff's land. The defendant contended that there was a public highway, and he more than once opened the plaintiff's fences, and traveled over the land, and threatened to continue to do so. The plaintiff was not required to institute an action at law for every act of trespass, but, to avoid a multiplicity of suits, it was his right to have relief in equity by injunction, regardless of whether the defendant was solvent or insolvent.

II. The plaintiff's land is bounded by a meandered body of water called "Goose Lake." The defendant claims that the land was not surveyed to the water's edge, but that when the original government survey was made the meandered line was established some distance from the lake, and that a public road has been established over this strip of land between the plaintiff's premises and the lake; and he claims that the plaintiff has no ground of complaint, because he does not own the land over which the alleged road is located. There was a large number of witnesses examined by the parties upon this question in the case. There was evidence tending to show that a corner of plaintiff's land was established some distance from the shore of the lake, and that the meandered line started from this corner, and there was evidence contradictory to this. The government plat and field-notes show that no reservation of land was made between the meandered line and the water's edge, but that the line intersected the lake. The

2. RIPARIAN
rights: gov-
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der lines.

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meander line is not a line of boundary. It is made for the purpose of ascertaining the quantity of land in the tract bordering on the lake or stream. *Kraut v. Crawford*, 18 Iowa, 549; *Musser v. Hershey*, 42 Iowa, 356. Under the rule of these cases, the plaintiff is a riparian owner, and his land extends to the lake.

III. It is claimed by appellant that there is a highway over the plaintiff's land by prescription. We have given this feature of the case very careful consideration, because we regard it as the only real question in the case. Our conclusion is that no presumptive right had been acquired when this suit was commenced. It would serve no useful purpose to set out the evidence on this branch of the case. It is enough to say that there is no sufficient showing of adverse user of the strip of land in question to authorize a finding that the public acquired a right to the same as a public highway. We discover no sufficient reason for disturbing the decree of the court below. AFFIRMED.

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79	100

DISTRICT TOWNSHIP OF CARROLL V. DISTRICT TOWNSHIP OF ARCADIA.

Statute of Limitations: AGREEMENT TO PAY MONEY: SCHOOL DISTRICTS. The defendant district was formed out of territory formerly belonging to the plaintiff district, and, in the adjustment of the indebtedness of the original district, for which the plaintiff was primarily liable, defendant agreed to pay a certain per cent. of it. More than fifteen years after that agreement was made, defendant having failed to pay, plaintiff brought this action to recover on the agreement. There was nothing in the contract or the petition to show any intention on the part of the contracting parties that payment should be delayed, nor any necessity therefor. *Held* that a right of action at once accrued upon the agreement, and that this action was barred by the statute of limitations.

Appeal from Carroll District Court.—HON. J. P. CONNER, Judge.

FILED, JANUARY 25, 1890.

PRIOR to June 5, 1871, the defendant district was included in that of the plaintiff, and known as the "District Township of Carroll." At that date the district was divided, and the defendant district created. The district township of Carroll, before the division, was indebted in a large amount; and on the thirteenth day of April, 1872, the two district townships, through their respective boards, with a view to properly adjust the burdens of the previous debt between them, made the following agreement: "At a meeting of the district township board of directors, the district township of Carroll, and the district township of Arcadia, in Carroll county, Iowa, held, on the thirteenth day of April, 1872, at the court house in Carroll, for the purpose of dividing the assets and liabilities, and adjusting all claims and differences between the said townships, it was resolved that the district township of Arcadia hereby assumes and agrees to pay one hundred and twenty-nine seven hundred and forty-two hundredths per cent. of the debt of Carroll township that existed at the time, on the fifth day of June, 1871; the judgment taxes of 1869 and 1870, and other unpaid tax levied by Carroll township, when collected, to be applied on the payment of said indebtedness, and said Arcadia township is to pay one hundred and twenty-nine seven hundred and forty-two hundredths per cent. of the remainder. Said township of Carroll agrees to pay said Arcadia township the sum of seven-hundred and forty-eight dollars for the use of the schoolhouse fund of Arcadia township, said payment to be made on or before February 5, 1873. The school tax levied, of all kinds, for 1871, upon the property in said Arcadia township, is to belong exclusively to Arcadia township. Said Arcadia township is to have its full *pro-rata* share of all discounts or money saved on the compromise of any of the indebtedness herein divided, and is to pay one hundred and twenty-nine seven hundred and forty-two hundredths per cent. of said indebtedness." This action was commenced in April, 1888, the petition

Dist. Twp. of Carroll v. Dist. Twp. of Arcadia.

showing that the proportionate amount due from the defendant district under contract, because of debts paid by the plaintiff, is eight thousand dollars; and to the petition is appended a statement of the items of such payment, and the dates thereof, showing the payments to have been made by the plaintiff at different dates, ranging, in point of time, from October, 1874, to March 1, 1880. The district court sustained a demurrer to the petition; and the plaintiff, electing to stand on its petition, appeals from a judgment on the demurrer.

Geo. R. Cloud, for appellant.

Powers & Powers, for appellee.

GRANGER, J.—The ground of the demurrer available for our consideration is that the action is barred by the statute of limitations. The agreement by which defendant was to pay does not in terms fix a particular time for payment; and unless, by legal inference from the terms of the contract, or from the averments of the petition, a rule may be deduced that would toll the running of the statute to a time within the statutory period, the action must be treated as barred. Keeping in view the query, when did the cause of action accrue? Let us first look to the contract, to ascertain its bearing on the question. By its terms, the defendant assumed and agreed to pay one hundred and twenty-nine seven hundred and forty-two hundredths per cent. of the indebtedness of Carroll township that existed at a prior date, June 5, 1871. It was agreed that the defendant should share *pro rata* all discounts or money saved on a compromise of any of the indebtedness. There is nothing in the contract to show a purpose of, or a necessity for, delaying an early adjustment of the affairs. Aiding the contract by averments of the petition, and such a purpose or necessity is no more apparent. It does not appear that at the time of making the agreement the amount of the indebtedness was not definitely known, nor that there was pending litigation or disputes, or any facts to negative a presumption that the parties intended prompt payment. The

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plaintiff treats itself as the party of primary liability to its creditors; and, as we view the contract, its purpose was to raise funds to aid in the payment of its debts. We see nothing in the terms of the contract to require the plaintiff, as between itself and the defendant, to first pay, and then seek repayment; but, with the primary obligation for payment upon it, it could at once demand the *pro-rata* share of the defendant, and maintain its action therefor.

Appellant's argument is based upon the theory that the contract "was a continuing one," and, as we understand, that its right to demand payment depended, from time to time, upon its payments of the different debts. We can only say, as in substance we have said before, that the averments of the petition do not justify such an inference. The contract is to pay a certain per cent. of the indebtedness, not of the separate debts; and the defendant's liability in no manner depended on the different items of the plaintiff's indebtedness, but upon the aggregate amount at a particular date. If the indebtedness should be lessened by compromise, the defendant should have a *pro-rata* share of such benefits. The action is at law, and the right of recovery depends upon a strict legal liability. No excuse for the long delay is offered on the part of the plaintiff; and, so far as the record discloses, all matters could have been as well adjusted in two years as in fifteen. What might have been the effect of a showing that disputes or litigation was pending or anticipated, and that payments by the defendant were not to be made until after adjustment, is not for us now to determine. It is certain that we cannot assume such a state of facts, to avoid the operation of the statute.

An exhibit to the petition contains an itemized statement of "Expenses of litigation," and some of these items appear from that statement to have been paid as late as September, 1879; but when the litigation took place, or what it was about, does not appear. We think the judgment below should be

AFFIRMED.

DISTRICT TOWNSHIP OF CARROLL v. DISTRICT
TOWNSHIP OF PLEASANT VALLEY.

Statute of Limitations: AGREEMENT TO PAY MONEY: SCHOOL DISTRICTS. *District Twp. of Carroll v. District Twp. of Arcadia*, ante, p. 96, followed.

Appeal from Carroll District Court.—HON. J. P. CONNER, Judge.

FILED, JANUARY 25, 1890.

THIS action is, in all essential particulars, like that of *District Twp. of Carroll v. District Twp. of Arcadia*, ante, p. 96, the defendant district in this case having been formerly a part of the plaintiff district; and, after separation, a contract was made for the payment of indebtedness as in the former case, except that it differs in amount, and some few particulars not essential. From the judgment on demurrer, as in the former case, the plaintiff appeals.

Geo. R. Cloud, for appellant.

Powers & Powers, for appellee.

GRANGER, J.—Counsel, in argument, have treated this case as being like that of *District Twp. of Carroll v. District Twp. of Arcadia*, ante, p. 96, and evidently think and expect the ruling in the two cases to be alike, as we think they must of necessity be; and, following that case, the judgment in this is

AFFIRMED.

RUSSELL & COMPANY V. MURDOCK *et al.*

1. **Promissory Notes : MADE ON SUNDAY : RATIFICATION BY PARTIAL PAYMENT.** Promissory notes executed on Sunday are void, but they are ratified, and thus made valid, by partial payment on a secular day. (Compare *Harrison v. Colton*, 31 Iowa, 16.)
2. **The Same : RATIFICATION BY PARTNER : ESTOPPEL.** Where the notes in such case are executed by two persons as partners, ratification by one will bind both; and the other, having alleged that she was a partner, cannot afterwards be heard to deny it in order to avoid the effect of the ratification.
3. **——— : RATIFICATION BY ONE JOINT MAKER** Partial payment by one joint maker of such notes is a ratification for other joint makers, and makes the notes valid as to them.
4. **——— : RATIFICATION OF MORTGAGE.** The ratification of such notes by partial payment is also a ratification of the mortgage, executed at the same time, to secure the notes.
5. **Sale of Machine : WARRANTY : FAILURE TO COMPLY WITH CONDITIONS.** Defendant purchased a machine of plaintiffs upon a warranty, but the contract provided that if it failed to fill the warranty within ten days of first use, written notice should be given to plaintiffs, and that they should have reasonable time to remedy the defects, and that continued use of the machine after the time named should be conclusive evidence that the warranty was fulfilled. Defendants gave no notice of defects within the prescribed time, but continued the use of the machine. *Held* that they could recover no damages upon an alleged breach of the warranty. (See opinion for citations.)
6. **——— : CONDITIONED UPON VOID SETTLEMENT : RATIFICATION.** Plaintiffs sold defendants a machine, for which the latter agreed to give their notes secured by a chattel mortgage, and it was provided that the title should not pass until settlement should be concluded and accepted. The notes and mortgage were made on Sunday, but they were afterwards ratified on a secular day. *Held* that by their ratification they became valid, and were then the settlement contemplated, and thereupon the title passed to the defendants.

79	101
88	612
79	101
89	402
79	101
94	148
79	101
1128	607
79	101
133	661
133	664
79	101
1143	9

Appeal from Humboldt District Court.—HON. LOT THOMAS, Judge.

FILED, JANUARY 25, 1890.

ACTION in chancery to foreclose a chattel mortgage. There was a decree rendering judgment against two of the three defendants, but no foreclosure of the mortgage. Both parties appeal, the plaintiffs first.

Albert E. Clarke and G. H. Shellenberger, for appellants.

J. W. Cory, for appellees.

BECK, J.—I. The mortgage sought to be foreclosed was executed to secure certain promissory notes made by defendants in consideration of a separator and attachments and a traction steam-engine, purchased by defendants from plaintiffs. The terms and conditions of the contract of purchase are expressed in an order for the property given by defendants, and addressed to plaintiffs. Among other conditions, the order contained the following: (1) The defendants agreed to execute, in security of the purchase money, a chattel mortgage upon certain specified personal property. (2) It was stipulated "that title to the goods shall not pass until settlement is concluded and accepted by Russell & Company." (3) Other conditions are in the following language: "*Fourth.* The above articles are warranted to be of good material, well made, and, with proper management, capable of doing as good work as similar articles of other manufactures. If said machinery, or any part thereof, shall fail to fill this warranty within ten days of first use, written notice shall be given to Russell & Company, Massillon, Ohio, and to the party through whom the machinery was purchased, stating wherein it fails to fill the warranty, and time, opportunity and friendly assistance given to reach the machinery and remedy any defects. If the defective machinery cannot then be made to fill the warranty, it may be returned by the undersigned to the place where received, and another furnished on the same terms of warranty, or money and notes, to the amount represented by the defective machine, shall be returned, and no further

Russell & Co. v. Murdock.

claim made on Russell & Company. Continued possession or use of the machine after the time named above shall be conclusive evidence that the warranty has been fulfilled to the satisfaction of the undersigned, who agree thereafter to make no further claim on Russell & Company under warranty. In case any casting fails through defect in its material during the first season, such defective piece shall be replaced without charge, except freight or express charges; but, on any claim for replacement of defective castings, the defective pieces shall be returned to Russell & Company, or to the dealer through whom the machinery was ordered, and shall clearly show the defects. Defects or failure of one part shall not condemn or be grounds for claiming renewal or for the return of any other part. It is expressly agreed that this warranty shall not include levers, nor will any be replaced on account of breakage. All warranties to be invalid and void in case the machine is not settled for when delivered, or if this warranty is changed, whether by erasure, addition or waiver."

II. It is shown by the evidence that the machinery was delivered to defendants upon this order on the nineteenth day of July, 1884, and that upon the next day, which was Sunday, the notes and mortgage in suit were executed. The evidence tends to show that the machinery did not comply with the warranty, but we find it unnecessary to find the facts upon this point, for reasons which will hereafter appear. The defendants, while claiming that the machinery did not comply with the warranty, did not return or offer to return it until the sixth day of January, 1888, more than two years after this action was commenced, and did not give written notice of failure of the machinery to comply with the warranty "within ten days of first use," as provided for by the conditions of the order set out above. They continued in possession and use of the machinery until long after suit was brought. The defendants, or one of them, acting for the other, made payments upon the notes before suit was commenced. The defendant, A. E. Murdock, is the wife of her

 Russell & Co. v. Murdock.

co-defendant, J. H. Murdock. The defendants, in a certain notice, set out in the separate answers, describe themselves as constituting a co-partnership.

III. A contract entered into on Sunday is void. But, if the parties enforce or perform it on a secular day, they will be regarded as ratifying it, and will be estopped from denying its validity. It will be regarded as valid from the day of its ratification. The ratification takes the place of the execution, and the contract becomes valid by reason of the ratification. Payment upon a Sunday note is a ratification. If it be not so held, this result would follow: The payee would receive and hold money paid him without consideration. But by the act of payment the maker recognizes the note as valid, and assumes to perform its obligations. It becomes a valid obligation from that day, and is no longer void because it is a Sunday note. See *Harrison v. Colton*, 31 Iowa, 16.

IV. It is insisted that A. E. Murdock, the wife of J. H. Murdock, did not ratify the Sunday contract. It is claimed that she was not a partner of the other defendants, and therefore their act of payment upon the notes did not bind her as a ratification of the contract. But, as she shows in her answer that she is a partner of her co-defendants, she will not now be permitted to deny it.

V. But, if she be not a partner of the other defendants, she jointly with them entered into the contract for the purchase of the machinery, and she jointly executed with them the notes and mortgages. The payments were made upon the joint contracts, and she received the benefit thereof by the discharge and satisfaction of the debt to the extent of the payment. The payments will be presumed to have been made with her approbation, as they operate for her benefit, discharging the debt *pro tanto*, and therefore satisfying the claim based upon the original contract of purchase, on which she is liable if the notes and mortgage are held void as Sunday contracts.

1. PROMISSORY
notes: made
on Sunday:
ratification
by partial
payment.

2. THE same:
ratification
by partner:
estoppel.

3. —: ratifica-
tion by one
joint maker

 Russell & Co. v. Murdock.

VI. The payment of a part of the debt, whether the payment was made and applied upon the notes or mortgage, is a ratification of both instruments. Both are but incidents of the debt, and the satisfaction of the debt will discharge both. So payment upon the debt will discharge *pro tanto* both instruments, and therefore operate as a ratification for both.

4. —: ratification of mortgage.

VII. Defendants, on a counter-claim, seek to recover damages for the breach of warranty of the machinery found in their order. They did not give notice of the failure of the machinery to fill the warranty within the time prescribed in the contract, and continued its possession and use after the term for its return prescribed in the contract of the parties. This, by the terms of the contract, operates as conclusive evidence of the fulfillment of the warranty to the satisfaction of the defendants. This condition cannot be disregarded, but must be enforced. Under it the defendants can set up no claim for a breach of the warranty. *Bayliss v. Hennessey*, 54 Iowa, 11; *Wendall v. Osborne*, 63 Iowa, 100; *Upton Manuf. Co. v. Huiske*, 69 Iowa, 557.

5. SALE of machine: warranty: failure to comply with conditions.

VIII. A condition of the order above set out is to the effect that the title to the machinery shall not pass "until a settlement is concluded and accepted by defendant." We understand that the settlement contemplated pertains to the transaction upon the order, and the giving of notes and mortgage for the purchase money. Counsel for defendants insist that, as the notes and mortgage were illegal because they were contracts made on Sunday, there was no "settlement" for the machinery, and title thereof remained in plaintiffs, and their only remedy is to recover the property, and they therefore cannot maintain this action to recover its price. The ready answer to this position is that, by the ratification of the Sunday contracts, they became valid, and were then the settlement contemplated, and thereupon the title of the property passed to defendants.

6. —: conditioned upon void settlement: ratification.

Hazzard v. The City of Council Bluffs.

IX. It is argued that the ratification of the notes and mortgage in effect ratified the settlement. This is doubtless correct. From this position counsel argue that defendants' claim for damages, on the ground of the breach of warranty, must be sustained. We fail to see any force in the argument. The warranty does not arise upon the notes and mortgage, the contracts ratified, but upon the order, the original contract of purchase. It was not a Sunday contract, and its validity was not affected by any other cause. It did not need ratification, and in fact was not ratified, but from the first was valid. As we have pointed out, defendants cannot recover damages because of the failure of the machinery to comply with the warranty, for the reason that they did not give the notice in the time prescribed in the contract, and retained possession of the property after it should have been returned under the terms of the contract.

X. It is our conclusion that plaintiffs ought to recover against all the defendants upon the notes, that the mortgages in suit ought to be foreclosed, and that defendant cannot recover upon their counter-claims or cross-petition. The cause will be remanded to the court below for a decree in accord with these conclusions, or, at the plaintiffs' election, such a decree will be entered in this court.

MODIFIED AND AFFIRMED.

HAZZARD V. THE CITY OF COUNCIL BLUFFS.

1. **Streets: NEGLIGENCE LEADING TO OBSTRUCTION: EVIDENCE.** In an action for injury to plaintiff's horse, caused by rubbish deposited on one of defendant's streets by the overflow of a culvert of insufficient capacity, *held* that it was error to exclude evidence that the culvert was of insufficient capacity and that it was choked up with rubbish, and that, by reason thereof, the rubbish causing the injury was deposited in the street; for, if defendant's negligence in the construction of the culvert caused the overflow, then the obstruction caused by the overflow was the result of that negligence.

79	106
87	54

79	106
126	784

79	106
140	337

Hazzard v. The City of Council Bluffs.

2. ———: ———: LIABILITY FOR INJURIES NOT FORESEEN. In such case it was error to instruct the jury that the defendant was not liable for negligence in constructing the culvert, on the ground that "the injury could not reasonably have been foreseen and apprehended as a result of the insufficient capacity of the culvert;" for if defendant was negligent, as alleged, it was liable for the results of such negligence, though it was impossible to foresee the particular injury resulting therefrom.

Appeal from Pottawattamie District Court.—HON.
H. E. DEEMER, Judge.

FILED, JANUARY 27, 1890.

ACTION to recover damages sustained by plaintiff from injuries to his horse, caused by defendant's negligence in constructing a culvert under a street of the city, which caused the deposit of impediments in the street. There was a verdict and judgment for defendant. Plaintiff appeals.

Flickinger Bros., for appellant.

G. A. Holmes, for appellee.

BECK, J.—I. Plaintiff's cause of action, as set out in his petition, is stated in the abstract in the following language: "Plaintiff in his petition alleges that, at the intersection of Pierce street and Park avenue, streets of defendant city, was situated a small culvert or bridge, forming the crossing of said streets; that said culvert was wholly inadequate in size and capacity to carry off the water from the north side of said avenue; that, by reason of such insufficiency and narrowness of the waterway, said culvert became fully stopped up with mud and rubbish, causing the drainage of the entire ditch on the east side of said avenue to flow upon, and over, said culvert, thus filling the intersection of said streets with mud, rubbish, stones, bricks and other refuse matter; that the defendant negligently and carelessly permitted and allowed large quantities

Hazzard v. The City of Council Bluffs.

of broken stones, bricks, brush, sticks and other rubbish to accumulate and remain at, or near, the intersection of said streets, and at the culvert aforesaid, and that the defendant city, in the construction of said culvert, negligently and carelessly caused same to be so constructed that it did not have sufficient capacity to carry off and drain the water from the ditch, for which it was designed; that, by reason of the negligent, careless and unskilful construction of said culvert, and its lack of capacity, the same became filled up with *débris*, mud and other accumulations, and the overflow thereof was carried into the street, by reason of which accumulation of rubbish and refuse matter in said street, and the condition of said culvert aforesaid, etc., plaintiff's horse, while being driven along the same, was seriously and irreparably injured by having its leg broken above the hock joint." Defendant in its answer denies the allegations of the petition, and alleges that the injuries to the horse were caused by the negligence of the plaintiff.

II. There was evidence given by plaintiff's witnesses tending to show that plaintiff's horse was injured by stepping upon a brick, which rolled, thus breaking his leg, and that the brick, with other obstruction, was washed upon the street by the overflow of the water, caused by the insufficiency of the culvert conducting the water under the street. Plaintiff offered evidence tending to show that the culvert was not of sufficient size, and that, by reason thereof, and of the further fact that it was blocked up with rubbish, the water flowed into the street, depositing there brick and other obstructions. The district court excluded this evidence, and other evidence tending to show the condition and character of the culvert. An instruction in the following language was given to the jury: "(10) As the evidence in this case shows the horse in question was injured, if injured at all, by a defect or obstruction which plaintiff claims was negligently and carelessly permitted and allowed to remain in the streets of the defendant city,

Hazzard v. The City of Council Bluffs.

you are instructed that the fact that the culvert near where the injury was caused was not of sufficient capacity to carry off the water that it was designed to carry off, or that it became stopped up with mud, and that one or the other fact, if it be a fact; caused the water to flow over the street in question, and that the overflow of said water carried the obstructions into the street, which plaintiff claims caused the injury, would not be sufficient to establish a liability on the part of defendant, for the reason that such injury could not reasonably have been foreseen and apprehended, as a result of the insufficient capacity or lack of repair of the said culvert."

III. It will be observed that plaintiff bases his action upon the negligence of defendant in permitting the bricks and other rubbish to accumulate upon the street. It is shown that the accumulation upon the street resulted from the negligent construction of the culvert. It was surely proper to show the origin and cause of the obstruction, in order that it might be determined whether defendant was liable therefor by reason of its own negligence. Unless defendant caused or permitted the obstruction to the street, it would not be liable. It is plain that, if defendant's negligence in the construction of the culvert caused the overflow of the street, the obstruction was caused by defendant's negligence. The evidence, therefore, was erroneously excluded.

IV. The tenth instruction, above set out, is clearly erroneous for the same reasons which condemn as erroneous the rulings upon the evidence just noticed. The reason stated in the instruction for holding that the defendant is not liable in this action for negligence in the construction of the culvert, viz., the "injury could not reasonably have been foreseen and apprehended, as a result of the insufficient capacity, or lack of capacity, of the culvert," is obviously unsound. It cannot be claimed that, to render one liable in an action for negligence, he must foresee the identical injury for which

1. STREETS:
negligence
leading to
obstruction:
evidence.

2. —:—:
liability for
injuries not
foreseen.

The State v. Butcher.

recovery is sought. Nothing less than supernatural foresight or prescience will enable any one to know just what injuries will result from an obstruction in a street. The person injured, the character of the injuries, and their extent, and the manner in which they will be incurred, cannot be foreknown by the one who is negligent or by any other person. It is sufficient for the negligent party to know that, from the obstruction in the street, which he negligently causes, the property or persons of those passing upon the street will be exposed to danger. It is not required that he should foresee the injury complained of, or any other injury. The error of the instruction is apparent. Other questions in the case need not be considered. For the errors pointed out the judgment of the district court is

REVERSED.

THE STATE V. BUTCHER.

1. **Information: FACTS NOT STATED: INSUFFICIENCY: ARREST OF JUDGMENT.** An information for disturbing a school, "for that the defendant * * * did commit the crime of unlawfully and wilfully disturbing and interrupting a school taught by," etc., is insufficient to sustain a conviction, because it fails to state the facts constituting the offense; and an objection based on such insufficiency may be raised for the first time on a motion in arrest of judgment. (See opinion for citations.)
2. ———: ———: **AMENDMENT AFTER VERDICT ON APPEAL.** While an information may be amended in justice's court, and after appeal to the district court, and the law in this respect is very liberal (see opinion for citations), yet where the cause has been appealed to the district court and a verdict has been rendered against defendant there, upon an information which fails to state the facts constituting the offense charged, it is then too late to amend the information by stating such facts.

Appeal from Muscatine District Court.—HON. C. M.
WATERMAN, Judge.

FILED, JANUARY 27, 1890.

79	110
98	665
99	16
79	110
106	109
79	110
107	708
79	110
1108	786
79	110
126	323

DEFENDANT was tried in justice's court on an information which accused him of "wilfully and unlawfully interrupting and disturbing a school," and convicted. He appealed to the district court, and was again convicted. From the judgment rendered in the district court he appeals.

J. J. Russell, for appellant.

H. J. Lauder, County Attorney, for the State.

ROBINSON, J.—After the verdict was returned in the district court, and before judgment was rendered, defendant filed a motion in arrest of judgment, the grounds of which were, in substance, that the information was insufficient to sustain a conviction. The motion was overruled, and leave given the state to amend the information, which was done. Judgment was therefore rendered on the verdict.

I. The body of the information, as originally filed, was as follows: "The above-named defendant is hereby

accused of the crime of wilfully and unlawfully interrupting and disturbing a school, for that the defendant on the thirty-first day of January, A. D. 1889, at Montpelier township, in said county, did commit the crime of unlawfully and wilfully disturbing and interrupting the school taught by Miss Louisa Franklin in district number four, Montpelier township, in said county, contrary to the statute in such case made and provided; wherefore she prays that the said Ambrose Butcher may be arrested and dealt with as provided by law." The first question presented by the appeal is the sufficiency of that information to sustain a conviction. Section 4662 of the Code requires the information to contain "a statement of the acts constituting the offense, in ordinary and concise language, and the time and place of the commission of the offense, as near as may be." The facts constituting the offense should be stated with as much precision in an information as in an indictment. Code, secs. 4662, 4296; *State v. Allen*,

The State v. Butcher.

32 Iowa, 492; *State v. Bitman*, 13 Iowa, 486. It has been held sufficient to charge an offense in the language of the statute (*State v. Curran*, 51 Iowa, 113; *State v. Brewer*, 53 Iowa, 735); but we think that rule does not apply when the language of the statute does not so fully describe the offense as to show the material facts which constitute it. It is not sufficient to charge a mere conclusion of law, as that the defendant has committed burglary or arson. Whart. Crim. Pl. & Pr., secs. 154-221. It is not sufficient to name the offense. The facts charged must show it. *State v. Shaw*, 35 Iowa, 577; *State v. McCormick*, 27 Iowa, 412. In this case, defendant was accused of committing the crime named, "for that the defendant," at the time and place named, "did commit the crime of unlawfully and wilfully disturbing and interrupting the school taught by Miss Louisa Franklin in district number four," in the county and township indicated. The acts constituting the offense are not stated. The statement does not show what was done, excepting by the averment of a legal conclusion. The information was defective, for the reasons stated in *State v. Murray*, 41 Iowa, 580, and not sufficient to sustain a conviction. It is contended on the part of the state that the information was sufficient, in the absence of attack before the case was submitted to the jury. Section 4491 of the Code provides that a motion in arrest of judgment shall be granted to defendant, after verdict against him, "(1) upon any ground which would have been ground of demurrer; (2) when, upon the whole record, no legal judgment can be pronounced." It follows that the defects are not waived by the failure to point them out until after verdict. See *State v. Potter*, 28 Iowa, 558.

II. The right to amend an information is well established. It has been held proper to cause it to be

<p>2. —: —: amendment after verdict on appeal.</p>	<p>signed after trial in justice's court, after appeal to and before trial in the district court- <i>State v. Merchant</i>, 38 Iowa, 375.</p>
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It has also been held that after conviction in justice's

Allen v. Platt.

court, and after a demurrer to the information has been sustained by the district court on appeal, it is proper to amend the information. *State v. Doe*, 50 Iowa, 541. In the case last named it was said, in effect, that such amendments should be permitted to any extent "consistent with the orderly conduct of judicial business, with the public interest, and with public rights." The question now presented is whether it would be within that rule to permit an amendment after verdict to show the facts constituting the offense. The requirement that such facts shall be stated in the information is not a mere matter of form. It is designed, not only to identify the crime, but to apprise the defendant of the essential facts upon which the state relies, in order that he may prepare his defense. In this case the facts upon which the state relied were set out for the first time after the verdict had been rendered, and after all opportunity for further preparation for defense was at an end. Since the amendment was not merely formal, we are of the opinion that it was offered too late, and should not have been allowed. The judgment of the district court is

REVERSED.

ALLEN V. PLATT.

1. **Pleading: ANSWER AFTER DEMURRER: EFFECT.** Where defendant demurs to a petition, and the demurrer is overruled, and defendant answers, he thereby admits the sufficiency of the petition, and he cannot again raise that question upon appeal.
2. **Contract: CONSIDERATION: ACTION BY BENEFICIARY.** Where a sheriff had levied upon a lot of hogs under execution in favor of plaintiff and against B., and defendant claimed to be the owner of the hogs, and he entered into a written contract with the sheriff, whereby he was permitted to take and sell the hogs, upon his agreement to hold the proceeds subject to the order of the court, and that the rights of plaintiff and the sheriff should be in no wise prejudiced, *held*—

Allen v. Platt.

- (1) That the instrument, being in writing, imported a consideration. (Code, sec. 2113.)
- (2) That the instrument was intended as a security for plaintiff, and that he was, therefore, entitled to bring an action upon it, under section 2552 of the Code. (See opinion for citations.)

Appeal from Sac District Court.—HON. J. P. CONNER,
Judge.

FILED, JANUARY 27, 1890.

ACTION on a contract executed by defendant in the following words:

“Whereas, Thos. Batie, sheriff of Sac county, Iowa, has levied upon forty-nine hogs as the property of H. J. Baxter under an execution in a judgment against Baxter *et al.*, and in favor of William Allen; and, whereas, I claim ownership of said hogs, and desire to ship the same to market: now, then, in consideration that I may so ship the same, I hereby receipt for them, to be held by me subject to said levy, it being clearly understood that I hold said hogs, and shall hold the proceeds thereof, subject to the order of the district court; the rights of said judgment creditor, William Allen, and of Thos. Batie, sheriff, being in no wise prejudiced. I agree to respond, upon the return of the execution under which said levy was made, upon the first day of the term of said district court of Iowa for Sac county, and abide by any order said court may make; it being understood that this writing does not prevent in any manner my rights to claim ownership of said hogs, or the proceeds thereof.

“J. O. PLATT.”

The petition contained allegations, in effect, that the plaintiff held a judgment against Baxter; that execution issued thereon, and was levied on the property referred to in the contract; that the contract in suit was executed; that the property was released to defendant by virtue thereof; that the execution had

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been returned unsatisfied; that the defendant had sold the property and converted the proceeds to his own use, and refused to apply the proceeds to the satisfaction of plaintiff's judgment; and asks judgment for such application. The answer contains four divisions, three of which aver defensive matter, and the fourth, matter by way of counter-claim. A reply was filed, and the cause tried upon the issues thus presented. The district court gave judgment for the plaintiff, from which the defendant appeals.

Goldsmith & Hart, for appellant.

Mason & Thomas, for appellee.

GRANGER, J.—The errors assigned are as follows: “(1) The court erred in holding that the plaintiff has such an interest in the cause of action that he may maintain this action. (2) The court erred in holding that there is shown to be a good and valid consideration passing between the parties, sufficient to make the contract upon which this action is brought a valid contract. (3) The court erred in holding that there was sufficient evidence to support the finding of the court.”

I. The first division of appellant's argument deals entirely with matters which appear on the face of the petition. The argument is introduced with these statements: “Plaintiff cannot maintain this action against the defendant. The petition does not contain allegations sufficient to constitute a cause of action in his favor.” With the state of the record, we do not consider these questions. They go only to the sufficiency of the pleading. To the petition a demurrer was presented, which was overruled, and, without even excepting to the ruling, the defendant answered. This was a waiver of the objection. The demurrer presented a law issue as to the sufficiency of the petition. The judgment of the court on that issue was favorable to the petition, and that judgment stands conclusive until in some manner set aside, under the

1. PLEADING:
answer after
demurrer:
effect.

Allen v. Platt.

provisions of the statute. This rule has support in very many cases, and they are to be found in the note to section 2651 of the Code, in both McClain's and Miller's Annotated Editions of 1888. The defendant, by taking issue on the allegations of the petition, thereby admits that they constitute a cause of action. *Frentress v. Mobley*, 10 Iowa, 450. Hence, after the answer was filed in this case, the trial proceeded upon the theory that the petition stated a cause of action, and it must be so treated on this appeal.

II. The second assignment presents the question that the contract has no consideration to support it, the

precise point relied on being, as we understand, that there was no consideration as between the parties to the suit. In the first division of this opinion it is held, under the state of the pleadings, that the petition shows a cause of action in favor of plaintiff. If, therefore, the contract is supported by any consideration, it must be one on which plaintiff can maintain the action. The contract is in writing, signed by the party, and imports a consideration. Code, sec. 2113. But it is said that the reply admits a want of consideration, and hence the fact is established by the pleadings. The reply does not in any sense indicate to us such a meaning or purpose, but, on the contrary, clearly puts in issue the matters pleaded, both by way of defense and counterclaim. In this connection appellant seems to regard the plaintiff as not a proper party to the suit, because not substituted by the court under the provisions of Code, section 2574, which has reference to actions against a sheriff or officer for the recovery of property taken on attachment or execution, and permits the party in whose favor the process issued to be substituted as defendant. This is no such a proceeding. It is an action by the party in whose favor the process issued, and not against an officer, or for the recovery of property. It is true, it seeks to recover a part of the proceeds of certain property, but the right of recovery is based on an instrument in writing averring a breach

2. CONTRACT:
considera-
tion: action
by benefi-
ciary.

The State v. Bell.

of the conditions thereof. Section 2552 of the Code is in these words: "When a bond or other instrument given to the state or county or other municipal corporation, or to any officer or person, is intended for the security of the public generally, or of particular individuals, suit may be brought thereon in the name of any person intended to be thus sued who has sustained an injury in consequence of a breach thereof." That the instrument in suit was intended as security for the plaintiff, in whose interest the execution issued and the property was seized, hardly admits of a doubt. The fact is apparent on the face of the instrument. That it was not a statutory bond or obligation makes no difference. *Garretson v. Reeder*, 23 Iowa, 21; *Sheppard v. Collins*, 12 Iowa, 570.

III. The remaining assignment is as to the sufficiency of the evidence to sustain the finding of the court. It is said that there is no material conflict in the evidence as to ownership of the property, and that it belonged to the defendant. We do not concur in this view. The evidence is decidedly conflicting as to the ownership, and the court below has found for the plaintiff. Under a well-recognized rule, we cannot interfere.

AFFIRMED

THE STATE V. BELL.

1. **Seduction: EVIDENCE: LETTERS FROM DEFENDANT.** In a prosecution for seduction, letters purporting to have been written and sent by the defendant to the prosecutrix, and as to which there was evidence tending to show that they were so written and sent, and the contents of which tended to show the relations between him and the prosecutrix, were properly admitted against him.
2. ——— : ——— : ——— : **INSTRUCTION.** Where, in such case, the letters purported to be from defendant, and the prosecutrix testified that she received them, and another witness testified to having carried letters from him to her, but defendant's experts expressed the opinion that they were not all in the same handwriting, the court properly instructed that if defendant had some other person write any of them, and he then sent them as his own, the effect would be the same as if he had written them himself.

79	117
84	524
79	117
88	62
79	117
100	679

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3. ——— : ——— : CORROBORATION. Where, in addition to the contents of such letters, there was other evidence tending to show intimacy and courtship between the parties, the prosecutrix was sufficiently corroborated, as required by section 4560 of the Code, to justify a verdict of guilty. (As to what constitutes corroboration in such cases, see cases cited in opinion.)

Appeal from Warren District Court.—HON. W. H. McHENRY, Judge.

FILED, JANUARY 27, 1890.

THE defendant was indicted for the crime of seduction, and on arraignment pleaded not guilty. Trial to a jury. Verdict of guilty. Defendant's motion for new trial overruled, and judgment on the verdict. Defendant appeals.

Powell & McGarry and H. McNeil, for appellant.

John Y. Stone, Attorney General, for the State.

GIVEN, J.—I. This case is submitted upon transcript and written briefs. On the trial, certain letters were produced by the prosecutrix, which she testified she had received from the defendant, and that they were in his handwriting. Another witness for the state expressed an opinion that they were in the defendant's handwriting, and one David Stevens testified to having carried several letters from the defendant to the prosecutrix, and answers from her to him. Appellant objected to the introduction of the letters produced as immaterial, and not sufficiently identified as being from the defendant, which objection was overruled. The original letters accompany the transcript, and are before the court. The contents of these letters, if from the defendant, are quite material, as tending to show the relations that existed between him and the prosecutrix. There certainly was evidence tending to show that these letters were from the defendant; hence there was no error in overruling the objection, and admitting the letters.

1. SEDUCTION:
evidence:
letters from
defendant.

The State v. Bell.

II. The defendant having introduced evidence of experts who expressed the opinion that the letters were not all in the same handwriting, the court
 2. —: —: instructed the jury that, if the defendant
 —: instru- had some other person write them or any of
 tion. them, and he then sent them to the prosecutrix as his letters, the effect would be the same as if he had written them himself. Appellant contends that there was not testimony upon which to base such an instruction, and cites a number of cases holding that to so instruct is prejudicial error. The letters purport to be from J. N. Bell. The prosecutrix testifies to receiving them, and David Stevens to having carried letters from the defendant to her. The testimony of the defendant's experts raised the question as to whether the letters were all in the same handwriting. The letters were before the jury, and they were at liberty to make their own comparisons. The instruction was evidently correct, and called for by the state of the testimony.

III. Appellant's further contention is that the verdict is not supported by the testimony, and especially in that the prosecutrix is not corroborated
 3. —: —: as required by section 4560, Code, and
 corrobor- because it does not appear that she was
 tion. previously of chaste character. That the crime charged was committed may be established by the testimony of the prosecutrix alone, but she must be corroborated by other evidence tending to connect the defendant with the crime. *State v. McLaughlin*, 44 Iowa, 82. In cases like this, facts showing intimacy, courtship and attending circumstances are corroborating evidence. *State v. Andre*, 5 Iowa, 389; *State v. Curran*, 51 Iowa, 112. The fact that the parties kept company together, and acted as lovers usually do, and other circumstances, may be sufficient corroboration. *State v. McClintic*, 73 Iowa, 663. In addition to what we have already said about the letters, there was other testimony tending to show intimacy and courtship between these parties. It is contended that the letters produced, being identified by

the prosecutrix alone, should not be considered as corroborating evidence. We have mentioned other evidence tending to identify the letters, and from which, and the face of the letters, it might be inferred that they were from the defendant to the plaintiff; and hence we hold that they were proper corroborating evidence, without now determining whether they would be such if their identification rested solely upon the testimony of the prosecutrix. We are clearly of the opinion that there was testimony corroborating the prosecutrix in her statements tending to connect the defendant with the commission of the offense charged.

Upon the issue as to the previous chastity of the prosecutrix, the defendant introduced testimony tending to show improper conduct and associations on her part during the time that she was employed in the city of Des Moines. We conclude from the character of the witnesses called, the nature of the statements made, and their inconsistency with the former life of the prosecutrix, that there was vastly more of fabrication than fact in the testimony. The state added to the presumption of chaste character the testimony of a number of neighbors and acquaintances that her previous character for chastity was good. Some stress is laid upon the claim that the prosecutrix was older and more experienced than the defendant. They were both of mature years, he but little younger than she, and a widower with two children. Neither should be heard to urge want of age and experience in excuse of their wrong. We have examined the entire transcript and argument with care, and find no error in the rulings and instructions of the court, and are of the opinion that the testimony fully supports the verdict. The judgment of the district court is therefore

AFFIRMED.

SADLER *et al.* v. OLMSTEAD.

1. **Pleading : DIFFERENT COUNTS FOR SAME CAUSE.** In the first count of plaintiff's petition he declared upon a contract for hay sold, and sought to recover the contract price. *Held* that this did not preclude him from setting up in another count an arbitration and award, in which the amount which defendant should pay for the same hay was determined; since but one recovery was sought upon the whole case, and plaintiff had a right to state his cause of action in different counts. (See *Pearson v. Railway Co.*, 45 Iowa, 497, and *Van Brunt v. Mather*, 48 Iowa, 503.)
2. ———: **ADMISSION OF AWARD IS ADMISSION OF AGREEMENT TO ARBITRATE: EVIDENCE.** Where plaintiff in one count sought to recover on a contract, and in another count sought to recover the amount of an award for the same thing, and the answer was a general denial, except as to facts admitted, and the award was admitted, *held* that this was, in effect, also an admission of the agreement to submit the matter to arbitration, and that it was error for the court to submit any other view of the case to the jury; but that, since the court proceeded upon the theory that there was an issue as to the submission to arbitration, it was inconsistent with that theory to exclude any evidence which tended to prove that the submission was fairly made.

Appeal from Tama District Court. — HON. L. G. KINNE, Judge.

FILED, JANUARY 27, 1890.

THIS is an action at law to recover judgment for certain hay sold by the plaintiffs to the defendant. The defendant, by answer and counter-claim, averred that he had more than paid for the hay actually delivered to him, and demanded judgment against the plaintiffs. There was a trial by jury, and a verdict and judgment against the plaintiffs. They appeal.

Brown & Miller, for appellants.

J. W. Willett and *W. H. Stivers*, for appellee.

ROTHROCK, C. J.—The petition is in two counts. In the first count it is averred that the plaintiffs sold and

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delivered to the defendant one hundred and three and three fourths tons of hay at the agreed price of six dollars per ton, and that defendant has paid them the sum of four hundred dollars, and that the sum of \$222.50 is due and owing to the plaintiffs. The second count sets forth the same sale of hay, and avers that said hay was weighed by the defendant, and received without complaint. That afterwards the defendant refused to make payment therefor, and a difference arose between the parties concerning the amount due on said contract, and as to the amount of hay delivered pursuant thereto, and what, if anything, defendant owed plaintiffs by reason thereof, and, in order to settle and adjust amicably said difference, the plaintiffs and defendant orally agreed to submit and refer said differences to J. L. Bracken, as an arbitrator to determine said differences and matters, and make his award accordingly; and that both parties plaintiffs and defendant agreed to abide by said award, and perform the same. That said Bracken, after having examined the said hay and heard the statements of the parties, did make an award touching said matter, pursuant to said agreement, which award was in writing and figures as follows: "Whereas, differences have arisen between T. Brown and M. Sadler, of the one part, and N. G. Olmstead, of the other, concerning a contract for the sale and delivery of hay, and the amount of hay delivered by said Brown & Sadler to the said Olmstead, the parties appeared before me, and I took the statements of each, and considered the statements of both parties as to the contract, examined the hay, and measured it, also saw the weights made by Mr. Olmstead; and, after carefully considering the whole matter, I determined that the said N. G. Olmstead was indebted to said T. Brown and M. Sadler for eighty-five tons of hay, amounting to five hundred and ten dollars; that, four hundred dollars being paid on same, there is still due one hundred and ten dollars from the said N. G. Olmstead to the said T. Brown and M. Sadler.

"J. L. BRACKEN."

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The defendant answered the petition by a general denial, except as admitted. As a further answer, the defendant alleged that he agreed to purchase of plaintiffs one hundred tons of good, well-cured, merchantable hay, to be delivered to defendant at six dollars per ton; that defendants commenced to deliver said hay from their meadows, and delivered about ten tons, in a wet, uncured condition, and consisting largely of slough grass, and defendant refused to receive any more of said hay in said condition, under said contract; and that it was then verbally agreed by and between the said plaintiffs and defendant that the balance of said hay should be delivered, placed in stacks, and when cured should be measured, and the number of tons be ascertained by measurement, and paid for accordingly; and that plaintiffs, after that, delivered fifty tons, making sixty tons in all; and that the defendant paid the plaintiffs four hundred dollars. In another count of the answer the defendant demands judgment against the plaintiffs for forty dollars on account of the overpayment for the hay. The defendant answered the count of the petition based upon the arbitration as follows: "That it is true that after the hay mentioned in the said count was delivered there was a dispute, and difference arose, between plaintiffs and defendant; and defendant admits that J. L. Bracken made and signed the instrument set out in the said second count of said petition."

It is conceded that but one purchase of hay was made; and the plaintiffs sought to recover upon one count only of the petition. The court so treated the cause in the instructions to the jury. We do not think the position of defendant's counsel, that the first count of the petition is a waiver of the award, is correct. The plaintiffs sought, in both counts of the petition, to recover of the defendant for certain hay sold and delivered, and had the right to state the cause of action in different counts. *Pearson v. Railway Co.*, 45 Iowa, 497; *Van Brunt v. Mather*, 48 Iowa, 503.

1. PLEADING:
different
counts for
same cause.

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The court instructed the jury upon the question of award as follows: “(3) If you find from a preponderance of the evidence that after the hay was delivered a difference arose between plaintiffs and defendant concerning the amount due on the contract for the sale and delivery of the hay, and as to the amount of hay in fact delivered; and if you further find that both parties agreed to, and did, refer said matters of difference to J. L. Bracken, an arbitrator, to determine, and that both plaintiffs and defendant then agreed to abide by the decision and award of said Bracken, and that, in pursuance thereof, the said Bracken did make the award which has been introduced in evidence,—then such award is binding on both parties thereto, and you will find for plaintiffs for one hundred and ten dollars; and if you find as above, then you will not consider the facts set out in the first count of plaintiff’s petition, as in such case plaintiffs should not recover on said count. (4) If you should fail to find that the matters referred to in instruction 3 were referred to J. L. Bracken, as arbitrator, then you will determine whether or not plaintiffs have established, by a preponderance of the evidence, the matters set out in the first count of their petition; and, if you find that plaintiffs sold and delivered to defendant good, well-cured, merchantable hay, under a contract for six dollars per ton, then you will ascertain how many tons of such hay were so delivered, and allow therefor six dollars per ton; and, after deducting from the aggregate sum so found four hundred dollars, the balance, if any, will be your verdict for plaintiffs, unless you find that said original contract was changed after part of the hay was delivered.”

We have stated the issues quite fully, for the purpose of determining just what was in controversy between the parties. It is true the answer contains a general denial, except as admitted. But it is admitted therein that after the hay was delivered there was a dispute and differences arose between plaintiffs and

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defendant, and that J. L. Bracken made and signed the instrument set out in the petition. The plaintiffs claim that this was an admission that there was an arbitration and an award. We think the position must be sustained. It is true the answer does not in express terms admit that the difference between the parties was submitted to Bracken as an arbitrator, but that fact should be held to be admitted when the award is admitted, and not attacked in any manner; and we think the court erred in submitting any other view of the case to the jury. This is what is denominated a "common-law submission to arbitration;" and to defeat such an award it is necessary for the defendant to impeach the same in some proper manner. *Foust v. Hastings*, 66 Iowa, 522. And such a submission is always construed most liberally, and with a view to compelling parties to submit to the adjustment of their differences made by an arbitrator fairly chosen. The defendant did not impeach the award by his answer. If it was supposed by the pleader that he could admit the award without admitting that there was a submission to the arbitrator, we think it was a mistaken view of the law of pleading. And we may say, further, that, even if the proper issue had been raised by the pleadings, there is nothing in the evidence which would warrant any interference with this award. It appears that the parties differed as to the amount of hay. The defendant claimed that the number of tons should be ascertained by measuring the stacks after they had settled, and the plaintiffs contended that the weights of the loads as they were delivered should be considered. It appears from the award that the arbitrator took into account all the claims of the parties, and made his award accordingly.

We have not considered in detail all the assignments of error. There were a number of rulings upon the evidence as to the matters between the parties which were submitted to arbitration whereby the plaintiffs were not permitted to show all that occurred before and at the time of the arbitration. We think everything

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pertaining to the differences between the parties should have been admitted in evidence, if it was allowable to introduce any evidence impeaching the award. As we have said, we do not think any attack could be made upon the award under the issues. But, upon the theory on which the case was tried, we think the plaintiffs ought to have been allowed to prove every fact which tended to show that the submission was fairly made. Under the instruction above set out, the jury should have returned a verdict for the plaintiffs for the amount found due by the award. REVERSED.

FARLEY V. HOLLENFELTZ.

Liquor Nuisance: ABATEMENT OF ACTION: OTHER ACTION PENDING.

The petition in this case charged defendant with keeping a liquor nuisance "at numbers 154 and 162 Sixth street," in the city of Dubuque. Defendant in his verified answer admitted all that plaintiff was required to prove to authorize an injunction restraining the nuisance; but he withdrew this answer, and filed an amended answer, denying generally, and setting up as a plea in abatement that another action, brought by the same plaintiff against him, was pending in the same court for the same purpose, wherein the place of the alleged nuisance was described as "number 168 Sixth street," in the city of Dubuque, and alleging that the places set out in the two petitions were identical. *Held* that the places could not, from their descriptions in the petitions, be regarded as identical, and, as the evidence introduced failed to establish such identity, and as defendant under oath, in his original answer, admitted all that plaintiff was required to prove, there should have been a decree granting an injunction as prayed, and for attorney's fees.

Appeal from Dubuque District Court.—HON. D. J. LENEHAN, Judge.

FILED, JANUARY 28, 1890.

ON the twenty-fifth day of August, 1886, the plaintiff, a citizen of Dubuque county, filed his petition charging that the defendant, at the city of Dubuque,

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“in a brick building at numbers 154 and 162 Sixth street, has established a saloon and place for the keeping and sale of intoxicating liquors” in violation of law, and has, since the eighth day of April, 1886, in said saloon, sold to divers persons intoxicating liquors contrary to law, and praying for an injunction, and for costs. On April 18, 1887, the defendant filed his verified answer, containing the following paragraph: “For further answer, defendant says that heretofore, to-wit, on the eighth day of April, 1870, he leased from the owner thereof the premises described in plaintiff’s petition for the sole purpose of selling beer and ale therein, and prepared the same for the carrying on of said business, and thereupon, at said time, to-wit, the eighth day of April, 1870, he commenced the prosecution of said business, and has ever since, at the place aforesaid, conducted the same; which said carrying on of said business as herein stated, to-wit, the sale of beer at retail at the place aforesaid, is the keeping of a saloon set up in plaintiff’s petition, and not other or different.” January 8, 1889, the defendant, by leave of court, withdrew said answer, and filed an amended answer, denying generally, and alleging “that there is now pending in this court, brought by the same plaintiff against this defendant, another action, making the same complaint, and stating the same facts, only the numbers of the place are different, but the place is in fact but one and the same place. And defendant further says that for the prosecution of this action plaintiff has neither paid, nor incurred any obligation to pay, any attorney’s fee whatever, nor paid any costs whatever.” On these issues the cause was submitted to the court, the plaintiff introducing in evidence the original answer, containing the paragraph above quoted. The defendant introduced the petition of this plaintiff against this defendant, filed in the district court of Dubuque county on the sixteenth day of April, 1885, alleging that the defendant “at the city and county of Dubuque, Iowa, at number 168 Sixth street, Dubuque, between Main and Locust streets, south side of Sixth

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street, has established a saloon and place for the keeping and sale of intoxicating liquors, contrary to law;" that in the month of April, 1885, he sold liquor therein contrary to law; "and that since the fifteenth day of July, 1884, at the saloon and place aforesaid, defendant has sold and continues to sell intoxicating liquors; and praying for injunction. Defendant also introduced his answer, filed April 18, 1887, to this petition, containing a paragraph the same as that in the original answer in this case, quoted above, and his amended answer, being a general denial. John Pier called by defendant; and the record shows the following as his testimony: "That he understands that Mrs. Sullivan owns the building Hollenfeltz's place is in, and, in reply to the question, 'How many places or rooms does Mr. Hollenfeltz occupy on the corner of the alley there, between Main and Locust?' he answered: 'He has one place there,—one saloon. He has got a storage room. I don't know what he has got in it. There is one small room there, east of the saloon, and the other part on the corner; and where the bar is in, where the liquors are sold, is one part. It is kind of like a double parlor. It's all the same thing.' Cross-Examination: Defendant occupied three rooms. The bar is in the middle room; the next room is a kind of attachment to the bar-room,—chairs and tables in there. A part of a partition divides two rooms, but is all the same thing. I don't know what is in the east room,—never been in there,—but have been there when the door was open, and noticed bottles and barrels stored in there." It was admitted that the plaintiff has incurred no liability for attorney's fee in this case; and upon this testimony and admission the case was submitted. The court rendered judgment dismissing the cause, and against plaintiff for costs. Plaintiff appeals.

S. P. Adams, for appellant.

Fouke & Lyon and *McCeney & O'Donnell*, for appellee.

GIVEN, J.—The admissions made by the defendant in the original answer in this case establish every fact that it is incumbent upon the plaintiff to prove, and, in the absence of any further testimony, entitles him to a decree as prayed. In that answer the defendant admits that he leased the premises described in the plaintiff's petition in April, 1870, for the sole purpose of selling beer and ale therein, and prepared the same for carrying on that business, and that he has carried on that business in said premises ever since, to-wit, the sale of "beer at retail at the place aforesaid." The place aforesaid is described as "in a brick building at numbers 154 and 162 Sixth street, Dubuque, Iowa. The defendant pleads in abatement of this action the pendency of the former. To maintain this plea the burden is upon him to show that both actions relate to the same place. The place described in this is, "in a brick building at numbers 154 and 162 Sixth street, Dubuque, Iowa," while the place described in the other action is "number 168 Sixth street, Dubuque, Iowa, between Main and Locust streets, south side of Sixth street." There is nothing in these descriptions to show that they refer to the same place, further than that both are described as being on Sixth street, Dubuque, Iowa. The only other testimony is that of John Pier. He testifies about the defendant's place in Mrs. Sullivan's building, the place on the corner of the alley between Main and Locust. The only identification that he gives of the place of which he is speaking is that he understands that Mrs. Sullivan owns the building; and, in answer to the question, "How many places or rooms does Mr. Hollenfeltz occupy on the corner of the alley there, between Main and Locust?" goes on to state with respect to the rooms. His testimony, as set out, does not even show that the place of which he is speaking is on Sixth street, nor is it designated by number, or any other description. Every word of his testimony may be strictly true, and yet the defendant be keeping other places of business at the numbers given in the two

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petitions. We do not understand why a matter about which the facts would seem to be so easily established should be left in such uncertainty. In the argument for appellee it is said: "We need not discuss the findings of fact, for it is well known and fully proven that the defendant occupies but one place, and uses all the rooms in that place in conducting the one business." We are not referred to any testimony as establishing this "well-known and fully-proven" fact.

Taking the testimony as it is before us, and we have the defendant admitting upon his oath, in the answer in this case, that he kept the place described in the petition as a saloon, to-wit, "in a brick building at numbers 154 and 162 Sixth street," and, in the answer filed in the former suit, that he kept a saloon at "number 168 Sixth street;" and, by Pier's testimony, that he kept a saloon in a building, which he understood Mrs. Sullivan owned, on the corner of the alley between Main and Locust. It was a possible thing for the defendant to be carrying on the saloon business at three different places; and, while such may not have been the fact, yet, certainly, it so appears, from this testimony. We think the defendant failed to sustain this plea in abatement by showing that the two actions relate to the same place; and, therefore, the judgment of the district court is reversed, and a decree granting an injunction as prayed, and for costs, including an attorney's fee of seventy-five dollars, will be entered in this court.

REVERSED.

ROSENTHAL & Co. v. MILLER.

Evidence: ERROR WITHOUT PREJUDICE. If it be admitted that the court erred in admitting testimony in this case, yet it appears that such errors were without prejudice, and therefore no ground for reversal, because, upon the evidence properly admitted, the judgment could not legally have been different from what it was.

Appeal from Council Bluffs Superior Court.—HON.
E. E. AYLESWORTH, Judge.

FILED, JANUARY 28, 1890.

ACTION upon an account. Defendant in his answer denied indebtedness, and set up a counter-claim for damages on account of the breach of a contract for the sale of certain goods. The case was tried without a jury, and judgment rendered for plaintiff. Defendant appeals.

Smith, Harl & McCabe, for appellant.

Flickinger Bros., for appellees.

BECK, J.—I. The objections made to the judgment of the court below are wholly directed against rulings upon exceptions to depositions and other testimony in the case. The action is upon an account for goods which were sold by a traveling salesman for plaintiffs. One of the plaintiffs testifies by deposition that the sale was made upon the order given to the salesman; that the goods were shipped to defendants; and to other matters that need not be specified. Various objections are made to the different interrogatories of the plaintiff's deposition; as that the evidence is hearsay, and that a copy of the account and order given for the goods was introduced in evidence. These objections were overruled. The plaintiff testifies to the fact that he personally supervised the shipping of the goods, and that the goods ordered were shipped. He presents a copy of the account for the goods. We do not understand that the copy is made evidence of the purchase, but is used to describe the goods sold and shipped. This witness did not produce the order for the goods; but it was afterwards produced by the traveling salesman who sold the goods. All this competent evidence conclusively shows that the goods were ordered by the defendant, and were shipped to him. He was a witness in the case, but made no denial in his testimony that the orders for the goods were given, or that the goods were received by

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him. There was evidence also tending to show admissions of the debt by failure to make any objection to the claim when it was first presented to defendant. All this evidence was certainly competent, and it cannot be doubted that it fully authorized the court below to enter judgment on the claim.

II. Now, let it be assumed that all other interrogatories than those presenting the evidence we have just recited, and all other evidence, upon the technical objections urged by counsel, should have been suppressed, yet the judgment must have been as it was finally rendered; and, had the court failed to render such judgment to that effect, it would have been an error requiring a reversal of its decision. It is therefore apparent that, if the court below erred in overruling defendant's objections and exceptions to evidence, it was error without prejudice, for which the law will not permit us to disturb the judgment.

AFFIRMED.

WILSON V. DANIELS *et al.*

79	132
86	428
79	132
90	299

1. **Homestead : ABANDONMENT : FACTS CONSTITUTING.** In this action to set aside a sheriff's sale of real estate on the ground that it was plaintiff's homestead, it appears that plaintiff ceased to occupy the property as a home about three years before the sale; that he directed the sheriff to levy on the property and sell it on execution; that he did not commence this action until about five years after the sale; and that the purchaser collected the rents for at least a portion of that time. *Held* that these facts, in connection with the fact that plaintiff and his wife established their home at another place before he commenced this action, constituted a clear case of abandonment, and justified a decree against him. The facts that when plaintiff removed from the house he left some carpets, window shades and the like, therein, and that three years after the sale he filed a claim of homestead in the property, and that he testified that he did not intend to abandon it, could not overcome his acts and declarations tending to show an abandonment.

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2. **Appeal: ABSTRACT FILED TOO LATE.** An appellee's abstract will not be stricken from the files because not filed within the time prescribed by the rules of this court, where it does not appear that the submission of the cause was delayed thereby.

Appeal from Linn District Court.—HON. J. H. PRESTON, Judge.

FILED, JANUARY 28, 1890.

THIS is an action in equity by which the plaintiff seeks to set aside and annul a sheriff's deed for a house and lot in the city of Marion, upon the ground that said property is the homestead of the plaintiff, and that the judgment upon which it was sold by the sheriff was no lien upon the premises, and the same were exempt from levy and sale. A hearing was had upon the merits, and a decree was entered for the defendants. Plaintiff appeals.

Rickel & Crocker, for appellant.

Thompson & Lanning, for appellees.

ROTHROCK, C. J.—It appears from the record that the plaintiff was the owner of the property in controversy. That he was married in October, 1870, and that he commenced to reside in the house on the lot in controversy in the year 1871, and continued to occupy the same as a home until September or October, 1873, when he removed therefrom with his family, and boarded at a hotel, which was owned by him, until about the year 1879. During this period he ceased to be the owner of the hotel, and when it passed into other hands he made a claim that it was his homestead, and attempted to assert such claim by some sort of legal proceedings. Upon his removal from the hotel he changed his residence to the city of Cedar Rapids, where he has since resided with his family. His wife purchased a home in the last-named place in the year 1880, and plaintiff and his family have resided therein since that

Wilson v. Daniels.

time. The property in controversy was sold at sheriff's sale in August, 1876, to A. Daniels, without redemption; and on the same day a sheriff's deed was made to said Daniels. This action was commenced in April, 1881, and it was finally tried and disposed of in November, 1887. It appears that a substituted petition was filed May 2, 1885, to which an answer was filed on the twenty-fifth day of the same month. Another substituted petition was filed June 1, 1885. It does not appear that any answer was filed to this last petition. There is some controversy between counsel as to this feature of the case. We regard it as of no consequence whether an answer was filed to the last substituted petition or not. It is not claimed that it presented any new issue. If it did not, the answer then on file was sufficient.

The question to be determined is, was there an abandonment of the property in controversy as a homestead at the time it was sold on execution?

1. **HOMESTEAD:**
abandonment: facts constituting. This is to be determined from the evidence. Without setting out the testimony in detail, we find that the following facts are established by a fair preponderance: The plaintiff ceased to occupy the property as a home about three years before the sale. He directed the sheriff to levy on the property and sell it on the execution. He did not commence this action until about five years after the sale was made. Daniels, the purchaser, collected the rents of the premises for at least part of that time. We think that these facts, in connection with the fact that the plaintiff and his wife established their present home before he commenced this action, constitute a clear case of abandonment. The fact that the plaintiff directed the levy to be made ought to preclude him from claiming any homestead right. It is true that when the plaintiff removed from the house he left some property therein, such as carpets, window shades and the like, and that in 1879 he filed a claim of homestead in the county recorder's office, and had it recorded, and he

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testifies that he did not intend to abandon his homestead. But this cannot be held to overcome his acts and declarations tending to show an abandonment.

The appellant presented a motion to strike the appellee's abstract from the files, because not filed within the time required by the rules of this court. The motion will be overruled.

2. **APPEAL:**
abstract filed
too late.

There is no showing that the submission of the cause was delayed by reason of the failure to file the abstract within the proper time. The decree of the district court will be

AFFIRMED.

STROFF *et ux.* v. SWAFFORD BROS. *et al.*

79	135
99	550
79	135
127	220

1. **Vendor and Vendee: FRAUD: RESCISSION: EVIDENCE.** The evidence in this case (see opinion) is *held* to show that defendants, who knew the value of the property on both sides, conveyed to plaintiffs land in the state of Missouri, worth one hundred and sixty dollars, in exchange for property in Iowa (where all the parties resided) and notes of the plaintiffs, worth in the aggregate twelve hundred dollars, and that defendants induced plaintiffs to make the exchange by false representations as to the quality, location and value of the land; wherefore it is *held* that the decree of the district court rescinding the contract was justified.
2. ——— : ——— : ——— : **TENDER.** In such case, although defendants had, prior to the beginning of the action for rescission, paid off an incumbrance on the property conveyed by plaintiffs to them, it was not necessary for plaintiffs, in order to recover, to tender the defendants the amount so paid; because defendants had conveyed the property, so that it could not be reconveyed to plaintiffs, and the decree could and did credit defendants with the amount, in fixing the money judgment which they should pay in lieu of the property.
3. ——— : ——— : ——— : **EXCESSIVE DEMAND.** Nor could a decree for rescission be avoided in such case because plaintiffs, in their offer to rescind, demanded their property back, and also their damages on account of expense and trouble; especially where there was nothing to show that defendants were disposed to make a restitution on any terms.

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4. — : — : — : DELAY. Where in such case it appeared that defendants agreed, when the contract was made, that, if their representations were not true, the property of plaintiffs was to be returned and damages paid, an action for rescission, based upon such agreement, could be maintained, though the offer to rescind was not made as promptly as is required where rescission is demanded on the ground of fraud alone.
5. — : — : — : DAMAGE TO LAND IN THE MEANTIME. Nor could defendants in such case avoid a rescission on the ground that, in the meantime, timber had been stolen from the land in Missouri, so that they could not be placed *in statu quo* by a reconveyance to them,—it appearing that plaintiffs had not been in possession of the land, nor responsible for the theft, and that it would doubtless have occurred had there been no change in the title.

Appeal from Linn District Court.—HON. J. H. PRESTON, Judge.

FILED, JANUARY 28, 1890.

ACTION in equity for the rescission of a contract for the sale of real estate and for general relief.

Rickel & Crocker, for appellants.

William G. Clark and James A. Reed, for appellees.

GRANGER, J.—In January, 1887, the plaintiffs, Charles Stroff and wife, resided at Mount Vernon, Iowa, as did also the defendants, Swafford Bros. On the twenty-eighth of the month they concluded an agreement by which one hundred and twenty acres of land in Missouri was conveyed to Charles Stroff, and in return the home of the plaintiffs, being a house and two lots in Mount Vernon, was conveyed to defendants. Stroff and wife had never seen the land in Missouri, and claim to have taken it on the representations of the defendants. It appears that in making the exchange the Missouri land was valued at twelve hundred dollars, and the house and lots at Mount Vernon at five hundred dollars, on which there was a mortgage incumbrance of one hundred dollars. The remaining eight hundred dollars for

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the Missouri land was secured by notes of Charles Stroff, and a mortgage on eighty acres of the land. The house and lots and the notes given by Charles Stroff were afterwards transferred to third parties by Swafford Bros. Plaintiffs in this proceeding claim that the transaction was fraudulent, because of misrepresentations as to the character and value of the land in Missouri; and also claim upon defendants' alleged agreement that, if the lands in Missouri were not as represented, they would receive the lands back, and restore to plaintiffs their property, with damages resulting to them, because of the misrepresentations. In the district court the issues were found with the plaintiffs, and it ordered a reconveyance of the Missouri lands to the defendants, and gave judgment for plaintiffs for twelve hundred and seventy dollars, being the contract price for the house and lots, and the amount of notes given by Stroff; the money judgment, however, to be satisfied by a surrender of the notes, and a reconveyance of the house and lots.

I. Appellants in argument present several questions for our consideration, the first of which refers to

1. VENDOR and
vendee:
[fraud: re-
scission: evi-
dence.

the sufficiency of the testimony to justify a finding of fraud. The testimony and the arguments have received careful attention, and we are satisfied that the defendants

have in this case intentionally deceived and wronged the plaintiff. We are first met with the clearly-established facts that the defendants, when making the contract, did not own the Missouri land, but with knowledge of its market value, having first secured a sale, and knowing the plaintiffs to have no knowledge of the land, they paid what they must have known to be its value, one hundred and sixty dollars, and received therefor from the plaintiffs twelve hundred dollars. It is further clearly established that at the time of making the contract the parties both lived at Mount Vernon, Iowa; that the defendants were men of business experience, and to some extent engaged in real-estate business; that the plaintiffs were persons of

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foreign birth and education, without business experience, or a purpose to engage in it, within the ordinary acceptation of the term; that they were purchasing the Missouri land for a home, and absorbing their home in Iowa for that purpose, having very little means; that the Missouri land was in a spur of the Ozark mountains, and unsuited for the purposes of a farm or a home for the plaintiffs. These facts in the case are practically without dispute, and of themselves show that the transaction, in its advantages, is all on one side. We have, then, a case, upon facts barely questioned, where one party knowing the values of the property on both sides of the transaction, has, as a result of the ignorance of the other party, absorbed his property for a trifle more than a tithe of its value. This is an advantage that an honest dealer never takes. Parties thus situated may sometimes be so hedged about by legal advantages as to receive protection, but a court of equity always views such a transaction with jealousy and mistrust. The party before a court of equity, asking that such advantages be legalized, should have his decree if he clearly stands within the shadow of the law; but upon questions of fact, when confronted by witnesses and circumstances which militate against him, he stands at a singular disadvantage. As to the representations made at the time of the transaction, the testimony is conflicting. We do not fully set out the testimony, and extended comments are unnecessary. Charles Stroff testifies that the defendants represented the land to be good soil, like that near Mount Vernon; that there were twenty-five or thirty acres of good land on each forty; that he could cut from two to three hundred ties from each forty acres; that Crocker station was thirteen miles distant, where he could get fifty cents apiece for them; and that the land was worth ten dollars per acre after the ties were removed. Mr. Stroff is somewhat corroborated by his wife, who says she could not well understand English, but could understand some, and she was present when the conversation

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took place. Speaking of the conversation, she says: "Mr. Swafford told us not to be afraid of them, and turned to me and said: 'If the land is not what I say,' he said we could come back and he would pay the loss, and that it was twenty-five to thirty in each good land, good farming land." A Mr. Perkins, against whose credibility plaintiffs earnestly contend, says he was present when the trade was talked, and he corroborates Mr. Stroff in his statements. Touching the value of the land, the defendants made statements to others fixing the value at ten dollars per acre, while their correspondence with one Mr. McGregor in Missouri, who held the land for sale, shows that they knew that the land was worth but \$1.25 per acre, and was on the market for that price. The defendants in their testimony clearly contradict the plaintiffs as to the representations made, and say that the plaintiffs took the land upon information obtained from other sources, and not upon their representations. If the representations were made as claimed by Stroff, they were grossly false. As a matter of fact, the land was twenty-five miles from the station. The intervening country was so uneven that ten ties would be a load for a team, and, with the expense of making ties on the market at Crocker station, would cost sixty-four cents, and their market value there was but twenty-five cents. Instead of there being twenty-five or thirty acres on each forty suitable for cultivation, there are but twenty-five or thirty acres in the entire tract, and about forty or fifty on which fruit could be raised. The testimony, taken together, impresses one with the belief that the land at this time for use is of no practical value. If it has a present value, it rests largely in its being an article for illegitimate speculation. It is in fact a mountainous tract of land. We believe, from the testimony, that the defendants did make the representations, and with the intent charged by the plaintiffs, and that the plaintiffs should have the relief given below, unless refused on other grounds.

II. It is said that the decree as entered is wrong, because the defendants, long before there was an effort
 2. —: —: at rescission, paid off the one-hundred-
 —: tender. dollar incumbrance on the house and lots conveyed to them, and there has been no tender of the money back. Appellees were not required to make such a tender, in view of the fact that the house and lots had been sold by appellants, and on the face of the record they could not be restored. In fixing the money judgment to be paid in lieu of the house and lots, the decree, in effect, credits appellants with the incumbrance paid.

It is urged that appellees, in their offer to rescind the contract after discovering the true condition of the
 8. —: —: land, demanded seventeen hundred and
 —: excessive fifty dollars; or, as we understand the
 demand. argument, they wanted their property back, and also the damages. It is likely true that they wanted a return of the property or its value, and, besides, the damages sustained because of expenses and trouble; but we do not understand that more was demanded, and the fact of such a demand would not defeat their right of recovery in this action. There is nothing to show that appellants were in any manner disposed to make restitution, and were denied the right because of excessive demands.

III. A question is further made that the offer of rescission was not made in time. We do not enter into
 4. —: —: a discussion of the testimony and authori-
 —: delay. ties on that question, because it is alleged, and we think proven, that it was agreed, when the contract was made, that, if the representations were not true, the property of appellees was to be returned, and damage paid. If that is true, appellees had the right to recover on that promise, and, conceding that in such a case a notice or demand for the return of the property would be necessary, the rigid rule claimed as applicable to cases of fraud does not govern.

IV. After the transfer of the land to plaintiffs, considerable of the timber thereon was cut off by timber

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5. —:—: thieves, and appellants urge that there can
 —: damage be no rescission of the contract, because
 to land in the the character of the property changed while
 meantime. the title was in the plaintiffs. There can be no ques-
 tion as to the authorities or the law to the effect that
 before appellees can rescind, and rightfully demand a
 return of their property, they must put appellants *in*
statu quo. Appellants are entitled to the land as it
 would have been but for the transfer. This, we think,
 they have done. The property must be treated as
 belonging to defendants in January, 1887. Plaintiffs
 never took actual possession of the land, and the change
 complained of was without their fault, and, we think,
 would have taken place if the title had been retained by
 the defendants. If this is so, then the defendants, as
 to the land, are in the same position they would have
 been had the transaction not taken place. Certainly
 they are in such a position, so far as the record can
 determine such a question. It is not claimed that the
 timber thefts resulted in any way from the transfer or
 change of title. The facts are not essentially different
 from what they would be if a tornado had swept over the
 land, and destroyed the timber, while the title was in
 plaintiffs. Surely, such a change in the condition of
 the property would not defeat the right of rescission.

V. The deed, by order of the court, was made to
 Swafford Bros., and there appears to be some confusion
 as to the initials of the members composing the firm;
 there being C. G., S. G. and L. G. Swafford. The dis-
 trict court found the firm to consist of C. G. and L. G.
 Swafford. It is urged that the testimony shows that
 the firm consists of C. G. and S. G. Swafford. To avoid
 any mistake in that respect, it will be here so decreed,
 and, as the deed now filed runs to Swafford Bros., the
 objection made will be fully avoided. We think the
 decree of the district court, with the slight modifica-
 tion, manifestly just, and it is

AFFIRMED.

PELLEY V. WALKER.

1. **Vendor and Vendee: RESALE UPON AGREEMENT TO ACCOUNT: RESCISSION.** Where plaintiff conveyed land to the defendant to secure a debt, and it was afterwards agreed that the latter should sell the land and, after paying the debt and another lien, should account to plaintiff for the balance of the proceeds, and plaintiff ratified a sale so made by surrendering possession of the premises to defendant's vendee, *held* that plaintiff's right to recover the balance of the proceeds could not be defeated by a rescission of the sale by defendant and his vendee, without plaintiff's consent.
2. **Contracts: NEW ONE ANNULING THE ORIGINAL: CONSIDERATION: PLEADING AND PROOF.** Where, in an action upon a contract, defendant answered that the one sued on was annulled by a new one subsequently made and based upon another consideration, the court properly instructed that defendant had the burden to prove, not only the new contract as alleged, but that it was sustained by some new consideration moving to plaintiff. Although, in this case, the consideration for the original agreement may have been sufficient to sustain the second one, the instruction was justified by defendant's theory of his defense, as stated in his answer.
3. **Damages: CONVERSION OF COMMERCIAL PAPER: EVIDENCE.** Commercial paper is presumptively worth its face, but in an action for its wrongful conversion its real value may be shown, as by proof of the insolvency of the maker. (See *Callanan v. Brown*, 31 Iowa, 841, and *Latham v. Brown*, 16 Iowa, 120.) In this case, where the face value of the notes converted by defendant was twenty-four hundred dollars, and he testified that he considered them worth seventeen hundred or eighteen hundred dollars, but their market value was not shown, and it did not appear that the mortgage security was inadequate, nor that the maker was insolvent, *held* that a finding by the jury that they were worth their face could not be disturbed on appeal.
4. **Appeal: EXCESSIVE JUDGMENT: REMITTITUR: COSTS.** In this case the judgment in favor of plaintiff, and from which defendant appealed, is found, by a calculation from the *data*, to be excessive; but, plaintiff having offered to remit the excess, the judgment is modified accordingly and affirmed, but at plaintiff's costs.

Appeal from Clay District Court.—HON. GEORGE H. CARR, Judge.

Pelley v. Walker.

FILED, JANUARY 28, 1890.

ACTION to recover an amount alleged to be due on account of the sale of real estate. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

Soper & Allen, for appellant.

Parker & Richardson, for appellee.

ROBINSON, J.—In April, 1886, plaintiff was the owner of one hundred and sixty acres of land in Clay county. The tract was incumbered by a mortgage in favor of the Central Loan and Trust Company of Des Moines for the sum of eight hundred and fifty dollars, and by another, in favor of defendant, for the sum of \$446.54. Plaintiff was also owing defendant the further sum of \$194.10, and, on the seventeenth day of the month named, to secure the payment of the last two sums specified, the plaintiff and his wife executed and delivered to defendant an instrument, in the form of a warranty deed, conveying the tract of land aforesaid, subject to the mortgage for eight hundred and fifty dollars. A lease of the premises was also executed by defendant to plaintiff. The plaintiff claims that in the month of July, 1886, he made an agreement with defendant by virtue of which the latter was to sell the premises to any one he might elect; that plaintiff was to have all for which such premises might be sold in excess of the indebtedness aforesaid, up to the sum of two thousand dollars, and one-half of all for which it should sell in excess of two thousand dollars; that on the twentieth day of January, 1887, defendant sold the premises to one Cross for the sum of twenty-four hundred dollars, but has failed to pay over any part of the proceeds of the sale. He therefore demands judgment for seven hundred dollars, with interest from date of sale. The defendant admits the sale to Cross for the amount stated, but claims that no money was received

Pelley v. Walker.

from the purchaser, but his notes, secured by a mortgage on the land only, and that the sale was made under a verbal agreement with plaintiff, by the terms of which plaintiff was to put the notes received on the sale on the market, and out of the proceeds thereof pay the eight hundred and fifty-dollar mortgage, and secure defendant the amount due him; and the surplus cash was to belong to plaintiff, after allowing defendant a reasonable commission for effecting the sale. The defendant further claims that after the sale to Cross was effected plaintiff refused to carry out his part of the agreement, but demanded money instead of the notes; that thereupon, by agreement between defendant and Cross, the sale was rescinded, and the deed was returned to defendant, and the notes and mortgages of Cross were returned to him. Defendant demands judgment, by way of counterclaim, for the amount due on his two notes, and for the amount of a judgment assigned to him which was rendered against plaintiff, and was a lien against the land in question. The amount of the verdict and judgment against defendant was \$711.16, besides costs.

I. Appellant contends that he was not the owner of the premises, but was, in contemplation of the law, a mortgagee; that by his conveyance to Cross he transferred his interest as mortgagee only, for that plaintiff was at the time in possession of the premises, and Cross was chargeable with notice of his rights; that therefore defendant and Cross were authorized to rescind the sale; and that plaintiff, having lost no rights, should not be heard to complain. But there was evidence from which the jury might have found that the sale was ratified by plaintiff. He surrendered possession of the premises to Cross after being informed of the sale; and the evidence tends to show that he did so before the sale was rescinded. That being true, he could not be affected by the agreement of defendant and Cross to rescind, without his consent, but had a right to insist upon having the fruits of the sale, according to the terms of his agreement with

1. **VENDOR** and
vendee: re-
sale upon
agreement to
account: re-
scission.

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defendant. Therefore the court did not err in not instructing the jury to return a verdict for defendant.

II. It seems to be conceded, in effect, that plaintiff gave to defendant authority in writing to sell the land

in question, although the writing was not produced on the trial. Plaintiff claims that this writing was given about the first day of July, 1886, and that it represented the only agreement for the sale of the premises

which he had with defendant. The latter admits the writing, but claims that it was given at a later date, and at about the time a sale to one Udi was contemplated. Defendant further claims that the sale to Cross was made under a later agreement, which was verbal. In an amendment to his answer, he speaks of it as follows:

“Said oral contract expressly waived, and made null and void, all former contracts, whether the same were in writing or not. Said contract was that, in consideration of the prospect of selling the said premises to B. B. Cross on time, for an enhanced price, the proceeds of the Cross sale, after paying indebtedness to defendant, and enabling plaintiff to realize on same, above commission to defendant, to go to plaintiff; that the plaintiff was to take the notes given by Cross, and convert the same into cash, to be used in payment of the indebtedness to defendant,—the balance for the benefit of plaintiff, as above stated.” Plaintiff denies the making of this alleged agreement, and there is a conflict of the evidence in regard to it. Appellant complains of a part of the ninth and of the fifteenth paragraphs of the charge to the jury, which are as follows: “(9)

* * * If you find, by a preponderance of the evidence, that the contract set up by the plaintiff was in fact entered into between the parties, then the plaintiff will be entitled to recover herein in accordance with its provisions, unless such contract was waived by a subsequent parol agreement entered into between the parties, for a good and sufficient consideration.” “(15) If you find that the contract sued on was in fact entered

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into between the parties, but that subsequent thereto, and prior to the sale to Cross, an oral contract was entered into between the parties, by the terms of which the said written contract was waived, and that the sale to Cross was made under such subsequent oral contract; and if you further find that there is a new or additional consideration for such oral contract,—that is, some other or further advantage or benefit to plaintiff, additional to the benefit he was to receive under the written contract, if any was made,—then the plaintiff is not entitled to recover upon the contract sued on, and your verdict should be for the defendant. The burden of proving such subsequent contract by a preponderance of the evidence is upon the defendant.” The ground of appellant’s complaint is that the portions of the charge quoted prohibit the finding that the subsequent parol agreement was made, unless a further and additional consideration was shown. It may be conceded, as claimed by appellant, that the consideration of the first agreement might have been sufficient to sustain the second, and that the charge, abstractly considered, is erroneous. But the answer of defendant as amended states that the oral agreement expressly waived, and made null and void, all former contracts, and specified a new consideration upon which it was based. It excludes by its terms the consideration of former agreements; and the portions of the charge objected to were evidently given on defendant’s theory of his defense. It is not, therefore, a case where a party has pleaded more than it is necessary for him to prove in order to succeed, but one where he has excluded from his defense matters not pleaded.

III. It is contended that the verdict is excessive, and not sustained by the evidence. Cross gave, in payment for the land, his two notes, amounting to twenty-four hundred dollars, secured by his two mortgages on the land. Plaintiff alleges that these were of the value of twenty-four hundred dollars; that his interest in them was of the value of seven hundred dollars; and that

8. DAMAGES:
conversion of
commercial
paper: evi-
dence.

Pelley v. Walker.

defendant wrongfully converted them to his own use, by surrendering them to Cross, and causing the notes to be destroyed. Plaintiff offered no evidence as to the value of the notes, excepting to show that they were secured by mortgages on the land sold. Commercial paper is presumptively worth the amount recoverable thereon; yet, in an action for its wrongful conversion, its real value may be shown to be less, as by showing the insolvency of the maker. *Callanan v. Brown*, 31 Iowa, 341; *Latham v. Brown*, 16 Iowa, 120. Defendant testified that the Cross notes "were worth, I should say, seventeen hundred to eighteen hundred dollars. * * * I consider these notes worth seventeen hundred to eighteen hundred dollars." But their market value was not shown, nor did it appear that the security was inadequate, nor that the maker was insolvent. Under these circumstances, we are not authorized to disturb the finding of the jury as to the value of the notes. It appears, without material conflict in the evidence, that the amount due January 20, 1887, the date of the sale to Cross, on the mortgage in favor of the Central Loan and Trust Company, and on the two notes given by plaintiff and held by defendant, was \$1,580.47. To that should be added the two hundred dollars which defendant was entitled to retain as one-half of the price paid for the land in excess of two thousand dollars; making \$1,780.47. That, deducted from the purchase price, left a balance \$619.53. Add to that sum interest thereon at six per cent. to the date of the verdict and the amount is \$684.83. The evidence shows that defendant took an assignment of a judgment against plaintiff, and in favor of Emerson, Iscott & Co., which was a lien on the premises in question, on which there was due at the date of the verdict the sum of \$58.25. Defendant asks to be allowed that amount, and his right to recover thereon, by way of counter-claim, does not seem to be questioned. Therefore we think he should be allowed for it, thus reducing the amount for which the verdict and judgment should have been to \$626.58, instead of \$711.16.

Ida Co. v. Woods.

Plaintiff offers to remit the amount of the judgment in excess of \$626.58, in case we find him entitled to recover no more than that sum. Judgment will therefore be rendered in favor of plaintiff for \$626.58, and interest thereon at six per cent. per annum from October 22, 1888. The costs of this appeal will be taxed to plaintiff.

MODIFIED AND AFFIRMED.

IDA COUNTY v. WOODS *et al.*

1. **Pleading: MOTION TO STRIKE SURPLUSAGE: APPEAL.** Error in overruling a motion to strike out of a petition irrelevant and redundant matter is not prejudicial, and an appeal will not lie from such a ruling, because the defendant still has the right to object to such matter on the trial. (See *Specht v. Spangenberg*, 70 Iowa, 488.)
2. ———: **MOTION FOR MORE SPECIFIC STATEMENT: PLEADING OVER.** Error in overruling a motion for a more specific statement is waived by pleading over.
3. **Appeal: PRESUMPTION IN FAVOR OF TRIAL COURT.** This court will presume, in favor of a judgment of the district court, that the action in which it was rendered was not prematurely brought, where the record does not forbid such presumption.
4. **Evidence: PROCEEDINGS OF BOARD OF SUPERVISORS.** The fact that no proceedings on a certain point were had by the board of supervisors is not a matter of record, and may be shown by the testimony of the county auditor, if he knows the fact.
5. **Embezzlement: EVIDENCE.** In an action to recover of an officer money alleged to have been embezzled, evidence that he had money on deposit in a bank, to his credit officially, at the time of the alleged embezzlement, is not admissible to negative the alleged embezzlement.

Appeal from Ida District Court.—HON. J. H. MACOMBER, Judge.

FILED, JANUARY 29, 1890.

79	148
86	237
79	148
89	710
79	148
98	857

ACTION upon an official bond against the principal and sureties. The cause was tried without a jury, and judgment was rendered for plaintiff. The sureties appeal

Warren & Buchanan and Bradshaw & McGiffin,
for appellants.

W. A. Helsell, for appellee.¹

BECK, J.—I. Defendants moved in court to strike out certain parts of the petition as irrelevant and redundant, and also for a more specific statement of the cause of action. These motions were overruled. The defendants did not stand upon their motions, but went to trial upon the pleadings as they stood before the motions were made. They now complain of the action of the court in overruling the motions.

II. By proceeding to trial after the motion to strike was overruled, defendants did not waive the right to object to the matter complained of as irrelevant and redundant; and, if the objection was well taken, they should have been treated as mere surplusage. *Specht v. Spangenberg*, 70 Iowa, 488. It follows that the error, if there was any, in overruling the motion, was without prejudice, for it left defendant free to urge his objection at the trial. Besides, it was held in the case just cited that an appeal does not lie from the overruling of a motion to strike.

III. The error, if any there be, in overruling the motion for a more specific statement, was waived by the defendants' pleading over. *Kline v. Railway Co.*, 50 Iowa, 656; *Coakley v. McCarty*, 34 Iowa, 105.

IV. It is insisted that the evidence fails to support the judgment. The arrearage claimed by plaintiff arose from fees of jurors, witnesses and others, received by the principal in the bond, as clerk of the county, and which were not paid into the county treasury, as

1. PLEADING:
motion to
strike surplusage:
appeal.

2. —: motion
for more specific
statement: pleading
over.

required by Code, section 3786. It cannot be said that there is such an absence of proof in support of the judgment as will require us to interfere. Indeed, we think one admission shown in the record is to the effect that the records kept by the clerk show the receipt of the money by him, but fail to show the payment by him. Surely, if the clerk was liable at all for the sums in question, his liability is sufficiently established by this admission, and other evidence in the case.

V. Counsel for defendants insist that plaintiff is not entitled to recover, for the reason that the petition alleges that the embezzlement occurred before the first Monday of July, 1886, and it is not shown that it did not occur more than a day or two before that date. The statute (Code, section 3786) requires payments of fees in the hands of the clerk to be made to the county treasurer on the first Mondays in January and July of each year. Now, as we have seen, it is shown that the clerk received the money, and he has failed to show that he has paid it out. He was bound to pay it six months after July 1, and at the expiration of that time he would be liable. While the abstract nowhere shows the exact date of the commencement of the actions, we are authorized to infer that it was commenced after the expiration of six months, in order to sustain the judgment of the court below, in the absence of any proof to the contrary. The clerk would at that time be liable for the money. The allegations of the petition do not estop the plaintiff to claim either that the embezzlement was six months before July 1, or that the suit was brought more than six months after that date. In either case, defendants would be liable.

VI. The county auditor verified a written statement filed with the supervisors as to the receipt of money by the clerk, and produced it. He stated that no proceedings were had in regard to it. To this last statement of the witness objections were made and overruled. We think

8 APPEAL: pre-
sumption in
favor of trial
court.

4. EVIDENCE:
proceedings
of board of
supervisors.

Porter v. Powell.

the evidence was rightly admitted. It was competent for the auditor to testify to the fact that no action on the statement was had by the board of supervisors. We know of no other way of establishing the negative fact that no proceedings were had than by the testimony of one knowing the fact.

VII. Defendants proposed to prove that the clerk had on deposit in a bank, to his credit officially, money in excess of the sum which it is alleged he embezzled, at the time of the embezzlement.

5. EMBEZZLEMENT: evidence.

The evidence was rightly excluded. The defendant could have paid to the parties entitled to it the money on deposit, and unlawfully appropriated other moneys. The evidence does not tend to show that the clerk did not unlawfully appropriate to his own use the money for which judgment was claimed in this case.

These views lead to a disposition of all questions in the case. The judgment of the district court is

AFFIRMED.

PORTER V. POWELL.

1. Domestic Relations: DUTY OF PARENT TO SUPPORT CHILD: IMPLIED PROMISE TO THIRD PARTY. It is the legal as well as moral duty of parents to support their children during minority; and, though a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same, such promise may be inferred on the grounds of the legal duty imposed. (See opinion for citations *pro* and *con*.)
2. ——— : LIABILITY OF PARENT FOR MEDICAL TREATMENT OF EMANCIPATED CHILD. Defendant's daughter, at the age of fourteen, went to reside away from her father's house, at a place thirty miles distant, where for three years she contracted for, earned and controlled her own wages, and provided herself with clothing; defendant consenting thereto, and not furnishing, nor agreeing to furnish, her with any money or means of support. While thus absent she was dangerously attacked with typhoid fever, and at

79	151
82	297
79	151
92	244
92	333
79	151
106	272
79	151
124	498
79	151
1133	174

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her request was attended by the plaintiff, as her physician, for a period of twenty-one consecutive days, which services were rendered without the procurement, knowledge or consent of defendant. *Held* that there was a partial emancipation only, and not such a total emancipation as exempted the defendant from actual necessities furnished to his daughter; that the services were necessary under the circumstances, and that judgment was rightly rendered against defendant therefor. (*Everett v. Sherfey*, 1 Iowa, 358, *distinguished*.) [BECK, J., *dissenting*.]

Appeal from Dallas District Court.—HON. O. B. AYRES, Judge.

FILED, JANUARY 29, 1890.

THE district court certifies to this court the following question, upon which it is desirable to have the opinion of the supreme court: "Is a father legally liable to a physician for the latter's services in professionally treating the minor daughter of said father, dangerously attacked with typhoid fever, who, at the date of said treatment, was seventeen years of age, and was then, and had been, residing away from her father's house for three years prior to the rendition of said services, earning and controlling her own wages, and providing herself with clothing, at a place thirty miles distant from her father's place of residence, the father not furnishing, or agreeing with his daughter to furnish, her with any money, or means of support, but consenting to her absence from home; the said professional services being rendered at the request of the said minor daughter, but were rendered and furnished without the procurement, knowledge or consent of the defendant, and without knowledge of the sickness, until demand was made for payment of said services by plaintiff, the attendance of plaintiff being from day to day, for a period of twenty-one days?" Judgment for plaintiff. Defendant appeals.

W. W. Cardell and *R. S. Barr*, for appellant.

Parsons & Perry and *D. W. Wooden*, for appellee.

GIVEN, J.—I. Appellant's contention is that the obligation of parents to support their minor children is only a moral one, and is not enforceable in the absence of statute or promise; that such promise is not to be implied from mere moral obligation, nor from the statute providing for the reimbursement of the public; and that an omission of duty, from which a jury may find a promise by implication of law, must be a legal duty, capable of enforcement by process of law. At first glance, this view of the law seems opposed to our natural sense of justice; yet it is not without support in the authorities. Such is held to be the law in New Hampshire and Vermont. See *Kelley v. Davis*, 49 N. H. 187; *Farmington v. Jones*, 36 N. H. 271; *Gordon v. Potter*, 17 Vt. 348. A different doctrine has long since been held in this state. In *Dawson v. Dawson*, 12 Iowa, 513, this court held that "the duty of the parent to maintain his offspring until they attain the age of maturity is a perfect common-law duty." In *Johnson v. Barnes*, 69 Iowa, 641, which was an action by the mother, who had been divorced, against the father, for support furnished their children, the court says: "As there was no promise, the question to be determined is whether one can be inferred in favor of a wife, who supports her child, as against her husband, who has without cause abandoned her and his child. The obligation of parents to support their children at common law is somewhat uncertain, ill defined and doubtful. Indeed, it has been said that there is no such obligation. * * * But we are not prepared to say that this rule has been adopted in this country, and it should be conceded, we think, that, independent of any statute, parents are bound to contribute to the support of their minor children, and that such obligation rests mainly on the father, in the absence of a statute, if of sufficient ability; and that, in favor of a third person who supports a child, a promise to pay may and should be inferred on the ground of the legal duty imposed." In

1. DOMESTIC
relations:
duty of par-
ent to support
child: im-
plied promise
to third
party.

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Van Valkinburgh v. Watson, 13 Johns. 480, it is said: "A parent is under a natural obligation to furnish necessities for his infant children; and, if the parent neglect that duty, any other person who supplies such necessities is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent." In 5 Wait. Act. & Def. 50, the author says: "The duty of parents to support, protect and educate their offspring is founded upon the nature of the connection between them. It is not only a moral obligation, but it is one which is recognized and enforced by law. * * * In order to hold the person liable in any case for goods furnished, either actual authority for the purchase must be shown, or circumstances from which such authority may be implied. * * * The legal obligation of parents in respect to support extends only to those things which are necessary; and if a parent refuses or neglects to provide such things for his child, and they are supplied by a stranger, the law will imply a promise on the part of the parent to pay for them." Without further citation of authorities, we announce as our conclusions that it is the legal as well as moral duty of parents to furnish necessary support to their children during minority; that a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same; and that such promise may be inferred on the grounds of the legal duty imposed.

II. It is further contended on behalf of appellant that the facts certified show an emancipation of his daughter, such as to relieve him from liability for the services sued for; that support and services are reciprocal duties, and if one is withheld the other may be withdrawn. Parents are entitled to the care, custody, control and services of their children during minority. To emancipate is to release; to set free. It need not be evidenced by any formal or required act. It may be

2. —: Liability
of parent for
medical
treatment of
emancipated
child.

proven by direct proof or by circumstances. To free a child, for all the period of minority, from care, custody, control and service would be a general emancipation; but to free him from only a part of the period of minority, or from only a part of the parent's rights, would be limited. The parent, having the several rights of care, custody, control and service during minority, may surely release from either without waiving his right to the other, or from a part of the time without waiving as to the whole. A father frees his son from service. That does not waive the right to care, custody and control, so far as the same can be exercised consistently with the right waived. He frees his son of eighteen from services for one year. That does not waive the right to his services after the year; and if the waiver has been for an indefinite period, the parent may assert his right to the services of the child at any time within the period of minority, subject to the rights of those who have contracted with the child on the strength of the waiver as to services. In the law of contracts, where a father expressly or impliedly, by his conduct, waives his right generally to the services of a minor child, such child is said to be emancipated. The child may sue, under such circumstances, on such contracts as are made with him for his services. *Nightingale v. Withington*, 15 Mass. 272; *McCoy v. Huffman*, 8 Cow. 84; *Stiles v. Granville*, 6 Cush. 458; Schouler, Dom. Rel., sec. 267. There is nothing in these authorities, nor any reason, against the view expressed, that emancipation may be general or limited. There is no direct evidence as to the purpose of the defendant with respect to his daughter; but we are to say, from the circumstances shown, whether they evidence either a general or limited emancipation. The case of *Everett v. Sherfey*, 1 Iowa, 358, is relied upon. That was an action to recover damages of the defendant for having harbored and retained the plaintiff's minor son in his employ. The issues and circumstances were quite different from those certified in this case. The court says: "There could be no such harboring as

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would render the defendant liable to the father in this action, if the son was in truth emancipated; and, if the son was not emancipated, it will still be a question whether there was such harboring as renders the defendant liable. By 'emancipation,' in this connection, we understand such act of the father as sets the son free from his subjection, and gives him the capacity of managing his own affairs as if he was of age." The following is given as a condensed statement of the facts: "In the spring or summer of 1852, plaintiff's son, a minor of the age of seventeen, went to reside at defendant's house, and was then and afterwards employed by him as a hired hand for over one year; the defendant paying the son full wages for his services. In February, 1853, plaintiff sued defendant to recover for the services, in which suit the judgment was for the defendant. The son was of a dissatisfied and roving disposition, careless and improvident in his habits, not under parental control, and, either through wilfulness or negligence, had not received the education proper for a person of his age and condition. In December, 1851, a misunderstanding arose between the parent and the child, which resulted in the son's leaving home, and residing and working at various places, before he went into the defendant's service. After said December, 1851, the father did not, apparently, have or exercise the proper and necessary control and authority over the said minor that a parent of a well-regulated family ought and should exercise, and permitted and sanctioned the hiring out of said minor at various places, and at different employments, away from home; but who made the contracts, or received the pay, is not stated nor proven. The father had also stated that he had no control over his son, and had in some instances waived his authority over him. It also appears that on the eleventh of September, 1852, the plaintiff, by publication in a newspaper, forewarned all persons from crediting his said son on his account, avowing, also, therein that he would pay no debts of his contracting, and that he would not

fulfill any contracts, or pay debts, entered into by him." The court says: "From these circumstances, to mention none others, we think the court might fairly conclude there was a manumission or emancipation up to the time above stated, and that there was no liability for giving the son shelter, residence and a home. At least, we think it so fairly deducible from the facts that we should not disturb the conclusion."

The circumstances disclosed in this case are these: The defendant's daughter, at the age of fourteen, went to reside away from her father's house, at a place thirty miles distant, where for three years she contracted for, earned and controlled her own wages, and provided herself with clothing, her father consenting thereto; he not furnishing, or agreeing to furnish, her with any money or means of support. That, while thus absent, she was dangerously attacked with typhoid fever, and at her request was attended by the plaintiff, as her physician, from day to day, for a period of twenty-one days, which services were rendered without the procurement, knowledge or consent of the defendant. These circumstances are widely different from those in *Everett v. Sherfey*. Here there was no disagreement that resulted in the daughter leaving home; no want or waiver of parental authority; no dissatisfied and roving disposition; no statement by the father that he had no control over his daughter; and no publication by the father notifying persons not to credit her on his account. The circumstances disclosed in this case are such as are of frequent occurrence in this country. Parents, either from necessity or from a desire to teach their children to be industrious and self-supporting, emancipate them from service, for a definite or indefinite time, without any intention of thereby releasing their right to exercise care, custody and control over the child. The obligation of parents to support their minor children does not arise alone out of the duty of the child to serve. If so, those who are unable to render service because of infancy, sickness or accident—who, most of all others, need support—would not be

entitled to it. Blackstone, in his Commentaries (volume 1, page 446), says: "The duty of parents to provide for the maintenance of their children is a principle of natural law,—an obligation, says Puffendorf, laid on them, not only by Nature herself, but by their own proper act in bringing them into the world; for they would be in the highest manner injurious to their issue if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right of receiving maintenance from their parents." This obligation to support is not grounded on the duty of the child to serve, but rather upon the inability of the child to care for itself. It is not only a duty to the child, but to the public. The duties extend only to the furnishing of necessities. What are necessities must be determined by the facts in each case. The law has fixed the age of majority; and it is until that age is attained that the law presumes the child incapable of taking care of itself, and has conferred upon the parent the right to care, custody, control and services, with the duty to support.

III. There being no direct evidence as to the purposes of the defendant with respect to his daughter, we are to say with what intention he consented to his daughter's going and remaining away from his home as she did. That he intended she should control her own earnings, at least until such time as he should declare otherwise, is evident; but that it was ever his intention that if, by sickness or accident, she should be rendered unable to support herself, he would not be responsible to those who might minister to her actual necessities, we do not believe. Such an inference from these facts would be a discredit to any father. In our view, there was, at most, but a partial emancipation,—an emancipation from service for an indefinite time. The father had a right at any time to require the daughter to

return to his home and service; and she had a right at any time to return to his service, and to claim his care, custody, control and support. There was no such an emancipation as exempted the father from liability for actual necessities furnished to his daughter. In view of the legal as well as the moral duty of appellant to furnish necessary support to his daughter during minority, and especially when unable, from infancy, disease or accident, to earn her own necessary support, we think he may well be understood as promising payment to any third person for actual necessities furnished to her. As already stated, what are necessities must be determined from the facts of each case. What would be necessary support to a child in sickness would not be necessary in health. The services sued for were evidently necessary for the support and well-being of the defendant's daughter. As we have seen, he had not relieved himself from the duty to furnish her such support, and, from his obligation to do so, may be presumed to have promised payment to any one who did furnish it in his absence. Our conclusion is that the judgment of the district court should be

AFFIRMED.

BECK, J. (*dissenting*).—I. I cannot assent to the doctrines and conclusions announced in the majority opinion in this case. The facts are presented in the certificate of the judge upon which the case is brought here on appeal. We cannot look elsewhere for the facts. They are, briefly stated, these: The daughter was seventeen years old, and, with the father's consent, was at service thirty miles away from his home, and had been for three years, all the time controlling her own wages, and supplying her own wants, and receiving nothing for support or necessities from her father. The father had no knowledge that services were rendered to the daughter by plaintiff, or that his daughter was sick. It is not shown that the daughter was a pauper, or without means to pay the plaintiff. No presumption to that effect will be entertained.

II. These facts show that the daughter was emancipated by the father. Emancipation may be shown by circumstances from which may be inferred the consent of the father that the child may control his own time, earnings and actions. Slight circumstances tending to show such consent are sufficient, in the absence of contradictory evidence. Schouler, Dom. Rel., sec. 267; *Everett v. Sherfey*, 1 Iowa, 358.

III. Emancipation relieves the child of subjection to the parent, and bestows upon him the capacity of managing his own affairs as if he were of age (*Everett v. Sherfey*, *supra*; Schouler, Dom. Rel., sec. 268); and it also relieves the parent of all legal obligation to support the child (Schouler, Dom. Rel., sec. 268).

IV. A parent is bound neither at common law, nor by any statute of the state, to support his children who are of age. *Monroe County v. Teller*, 51 Iowa, 670; *Blachley v. Laba*, 63 Iowa, 22. As I have shown, an emancipated child stands as to his obligation to his parent and the parent's exemption from obligation for his support, just as a child who is of age.

V. It may be that the parent would be under obligation to support a pauper child who is of full age, or that a promise would be inferred on the part of the father to render such support. But that point is not in this case, as it is not shown or claimed that the child for whose support the father was sued is a pauper, or not possessed of ample means to pay plaintiff for the services rendered by him.

VI. Doctrines as to the liability of the father for the support of his minor child, and his liability therefor upon a promise, express or implied, and upon other points of the law, are found in the majority opinion, from which I dissent. As tending to support my views, I cite the following decisions of this court: *Dawson v. Dawson*, 12 Iowa, 512; *Johnson v. Barnes*, 69 Iowa, 641. See, to the same effect, Schouler, Dom. Rel., sec. 236. In my opinion, the judgment of the district court ought to be

REVERSED.

HERMAN V. THE CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY.

79	161
87	467
79	161
100	360

Railroads: INJURY TO PASSENGER IN JUMPING FROM MOVING TRAIN: CONTRIBUTORY NEGLIGENCE: EVIDENCE. The testimony in this case (see opinion) shows that plaintiff was riding on the rear platform on defendant's caboose as he was nearing his destination; that it was a dark night; that while there the conductor took his ticket, but said nothing to him. Plaintiff testified that some one told him that the train would not stop at the station, but would "slow up," and that he should jump off after the caboose had passed the platform, to which plaintiff responded, "all right;" but plaintiff was unable to say that it was the conductor who thus addressed him, or who it was, and the conductor and the brakeman each testify that he told him no such thing. The train did "slow up," and the conductor testified that it would have stopped, had he not discovered that plaintiff had left it, and, therefore, signaled for it to go ahead. Plaintiff was a railroad man, of nine years' experience, and was accustomed to ride upon trains. He jumped off the train and was injured. *Held* that the evidence showed negligence on the part of plaintiff, but failed to show any on the part of defendant, and that plaintiff could not recover.

Appeal from Cedar Rapids Superior Court.—HON.
JOHN T. STONEMAN, Judge.

FILED, JANUARY 29, 1890.

THIS is an action to recover damages for a personal injury which the plaintiff received by jumping from a moving railroad train on defendant's road at Fairfax station, in Linn county. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

Mills & Keeler, for appellant.

C. W. Bingham and *Hormel & Harrison*, for appellee.

ROTHROCK, C. J.—On the evening of the twentieth day of August, 1888, the plaintiff purchased a railroad ticket of the agent of the defendant at Cedar Rapids

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for Fairfax station, distant some nine miles. He took passage on a freight train, and rode the whole distance on the rear platform of the last car in the train, it being a caboose or way-car. When passing the station at Fairfax, and while the train was running very slowly, the plaintiff, after the rear end of the caboose had passed the platform, jumped to the ground, and was injured.

In the original petition filed in the case the ground of recovery was based upon the alleged negligence of the defendant in commanding him that "if plaintiff wanted to get off at Fairfax, he must jump off the train as it goes by;" that the train would not stop at that station; that, after the train slowed up to some extent, he "jumped," as commanded by defendant. He alleged that, by reason of the movement of the train, he was thrown violently to the ground, "breaking his collar bone," and otherwise injuring him. After the evidence was introduced, he filed an amended and substituted petition, in which he alleged that the conductor and brakeman ordered him to jump from the train; and, as he was mistaken in alleging that his collar bone was broken, he omitted that averment from his substituted petition.

It was conceded all through the trial, and the court instructed the jury, that, if the conductor did not direct nor consent that plaintiff should jump from the train while in motion, then the plaintiff, in jumping from the train, was guilty of a misdemeanor, and could not recover. This instruction is conceded to be correct, because by section 2, chapter 148, Laws, Sixteenth General Assembly, it would have been a misdemeanor for plaintiff to jump from the train while it was in motion, and under such a state of facts the law would conclusively presume that the injury was the result of his own negligence. After the evidence was introduced, it became apparent that the right of the plaintiff to demand further attention from the court and the jury to his case depended upon whether he jumped from the

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train of his own motion, or whether the conductor was so connected with the transaction that in any event, or under any circumstances, the defendant company would be liable for the injury. Like nearly every case presented to a court or jury, there came a turning point in the progress of the trial, where the rights of the parties depended upon a single question. It is understood to be the duty of counsel to present to this court every adverse ruling of the trial judge. This course is pursued out of abundant caution, and a large part of the labor of appellate courts consists of searching the record for the vital questions upon which the rights of the parties depend. It will be understood from these observations why we do not, in determining causes, discuss every proposition submitted to us by counsel. We do not desire to be understood as criticising counsel in this case for presenting questions without merit. The appeal is well presented, in every respect, by counsel for the respective parties.

It is claimed by counsel for appellant that the conductor not only did not order nor direct the plaintiff to jump from the train, but that he (the plaintiff) did so without the knowledge of the conductor. Counsel for appellee insists that this proposition is not true, or that there was sufficient evidence that the conductor ordered or consented to the act of jumping from the train to authorize the jury to make that finding. The evidence on this question does not appear to us to be doubtful. There is no controversy as to the facts testified to by the witnesses. The cause was submitted to us upon the abstract of appellant, without amendment by appellee.

The plaintiff was examined as a witness in his own behalf. He testified that soon after the train started from the station at Cedar Rapids the conductor came upon the rear platform, and took up his ticket; that he did not see any persons on the car, but two persons, the conductor and brakeman; that he looked all over the car, from his position on the platform, and that no one but the two men were in the car. The examination of the

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plaintiff, as a witness, proceeded as follows: *Question.* Did any one tell you to jump off? *Answer.* Yes; a man told me to. *Q.* Who was it? *A.* I don't know. He said, 'You go soon; I go a little slow.' A man with cap on. *Q.* One of the two men you saw in the car? *A.* I saw one man open the door. *Q.* Was it the man who took your ticket? *A.* I did not see him very much. *Q.* Did he come out on the platform where you were? *A.* No; he opened the door, and said, 'You go soon; I will go slow a little.' This man said he will go slow, 'You jump.' *Q.* Was this near Fairfax, that he told you to jump? *A.* Yes; a quarter of a mile before Fairfax he said to jump. *Q.* Where were you to jump? *A.* On the west side of the depot, at Fairfax. *Q.* Did the conductor tell you to jump when he took your ticket? *A.* No; he did not tell me anything. A quarter of a mile from Fairfax he said to jump. *Q.* Did he tell you where to jump, or when? *A.* He no tell me when to jump. (An interpreter was here sworn, and interpreted remaining testimony of plaintiff.) *Q.* State what the conductor said to you when you were within a quarter of a mile of Fairfax? *A.* He told me to jump off, and they would slow up. *Q.* Did the conductor at that time say anything about the train not stopping at Fairfax? *A.* I can't say whether it was the conductor or not, but the man that opened the door told me to jump, and they would slow up. *Q.* Where was it the conductor said the train would slow up? *A.* A quarter of a mile this side of Fairfax. *Q.* Did he tell you when to jump? *A.* He did not tell me. *Q.* Did he tell you where to jump? *A.* He did not. *Q.* What did he tell you? *A.* A quarter of a mile this side of Fairfax the conductor told me he would slow up at Fairfax, and I should jump off. *Q.* Did he say anything to you about the train not going to stop at Fairfax? *A.* He did not tell me anything about it. *Q.* Did he tell you anything more than what you have said he did? *A.* Nothing else."

In his cross-examination he testified as follows:
"Cross-Examination. Bought my ticket at the ticket

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window of Milwaukee depot, in Cedar Rapids, in the men's waiting-room. Was there from six o'clock until train started. It was behind time. Cannot tell just when it did start. Had no watch. When I got on train I got on the rear platform of the caboose. Rode there all the way to Fairfax. I had a half-gallon stone-ware jug with me. It was full of alcohol. Had this jug in my right hand when I jumped. I had taken one drink that afternoon. It was 'Prohi.' Got the alcohol in Cedar Rapids. Don't drink it. Conductor took my ticket on the train. Don't know him. The conductor said nothing to me at the time he took my ticket. He took it on the rear platform, and then went into the car. He did not say a word to me then. Did talk with me near Fairfax. *Question.* Did you not say a few minutes ago that you did not know who did talk with you about getting off the train? *Answer.* I did not know who the man was that told me to get off the train; it was one of the trainmen. *Q.* How do you know it was one of the trainmen? *A.* I did not see any one but the trainmen in there. I saw only two. *Q.* Did more than one person talk with you that night on the train between Cedar Rapids and Fairfax? *A.* Only one. *Q.* State the words the man used in talking to you. *A.* He said he would slow up, and I could jump off at Fairfax, as he would not stop at Fairfax; this was a quarter of a mile east of Fairfax. *Q.* Did you make any reply to him? *A.* I said, 'All right.' That is all I said. *Q.* Did you say anything to anybody after that, and before you jumped off the train? *A.* To nobody else. *Q.* Did anybody else say anything to you after that, and before you jumped off at Fairfax? *A.* No, sir. *Q.* Was your back to this man when he opened the car door, and spoke to you? *A.* Yes; my back was towards him. I saw him as he opened the door. *Q.* Did he come out on the platform or not? *A.* No, sir; only opened the door. *Q.* Do you know who it was? *A.* I could not tell who it was. *Q.* You had not seen him before, had you? *A.* I did not see the same man before. *Q.* Did you see the same man afterward? *A.* No; I did not. *Q.* Then, so

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far as you know, you never saw the man before or since? A. No, sir. Q. Was your reply 'All right?' A. Yes; I said, 'All right.' This was about one-quarter of a mile this side or east of Fairfax. Q. Did the man use these words as you have stated in the petition,—that the train would slow up if you wanted to get off? A. Yes. Q. That was the way he put it, was it? A. Yes, sir. Q. Are you sure of that? A. Yes, sir. Before you get to Fairfax a public road crosses the track leading to town. I did not attempt to get off there. When the caboose passed the depot platform I was standing on the left-hand side of the caboose platform, and with my face towards the depot. I was standing on the end of the platform from the depot. Did not try to get off on the depot platform. Jumped off on the side away from the depot. There was no platform on that side where I jumped. It is correct when I say it was in the neighborhood of fifty or sixty feet west of the depot where I jumped off. It was a pretty dark night then. Could see where I was going to light. I held onto the rail of the caboose with my left hand when I jumped, and held the jug in my right hand. The train slowed up at the depot. It did not slow up any before it got to the depot, but did slow up at the depot. There is a pretty steep up grade there, going west. Don't know whether it is one or two miles in length, There is quite a curve east of the depot. It is straight track just west of the depot. Right from the depot there is a curve, and then it runs straight west of the depot. After the caboose passed the depot it did not slow up any before I jumped off. After I jumped, did not watch the train any further, and did not see it any longer. They go in the curve. I could not see them anyhow, and don't know whether they stopped or not. Don't know whether the brakeman was putting on the brakes to stop the train before I jumped, or whether the engineer had been signaled from the caboose to stop the train. Did not ask anything about that of anybody. When I jumped off the caboose nobody else was standing on the platform where I jumped. I could not tell how fast the train was going

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when I jumped off. I did not pay any attention to that. Have been railroading nine years. Am accustomed to ride on trains. Know that an ordinary freight train does not stop its caboose at the depot. There was no person on the rear platform with me when the caboose passed the depot, or when it passed the east switch. It is true that I did not get off before I did, because I thought from the movements of the train it was going to stop. I told Joseph Cross, my section foreman, after the accident, that I thought the train stopped; remember that conversation. Accident happened on the twentieth, and I went to work in six weeks. I mean thirty-six working days. Cannot tell what month it was. I have been at work ever since, earning the same wages as before. At time I jumped did not know whether there was any danger in jumping as I did."

It will be observed that the plaintiff did not testify that it was the conductor who talked with him about getting off the train. On the contrary, he stated positively, and every time that his attention was called to it, that he did not know whether it was the conductor or not. The only answers tending to show that it was the conductor were put into the mouth of the witness by his examiner. On the other hand, the conductor testified in the most positive terms that he did not have any communication with the defendant,—no communication whatever; that he knew from his ticket that his destination was Fairfax; that he ordered the brakeman to stop the train; that the brakeman gave the signal to stop, set brakes, and the train slowed down; that he (the conductor) went on the rear platform of the caboose just as the caboose passed the depot, to call the number of the train to the operator; that he did not see the plaintiff on the platform; that soon after the caboose passed the depot he looked for plaintiff on the platform, and thought he was off, and directed the brakeman to let the train go on. The brakeman testified that he spoke to plaintiff when nearing Fairfax, and told him that the train would stop for him to get off; that he did not tell him that he would have to jump off, or

anything of that kind. He also testified that he gave the signal to stop, and that the train was slowed down; and there is absolutely no conflict in the evidence on this question. The train would have stopped to land the plaintiff if he had not jumped while it was in motion.

It is contended by counsel for appellee that, as the conductor testified that he was on the rear platform when the train passed the depot, he must have seen the plaintiff before he jumped from the platform. But this does not tend to prove that the conductor ordered the plaintiff to jump off. The plaintiff testified that the order was given to him a quarter of a mile before reaching the depot. He testified upon that subject as follows: "When I jumped off the caboose, nobody else was standing on the platform when I jumped;" and "there was no person on the rear platform with me when the caboose passed the depot, or when it passed the east switch." It is evident, therefore, that, if any importance was attached to the fact that the two men were on the platform at the same time, it was wholly without warrant; for the plaintiff himself does not claim that he was induced to jump by reason of anything that occurred when the conductor was on the rear platform. For the purposes of this case, the fact of the two men being on the rear platform at the same time had no more significance than if they had been one thousand miles from each other.

In addition to the general verdict for the plaintiff, the jury answered certain special interrogatories submitted to them by the court, which, with the answers thereto, are as follows: "(1) Did the plaintiff, in jumping from the car, act as a person of ordinary prudence and caution would have done under like circumstances? *Answer* (by jury). Yes. (2) How far from the station at Fairfax, and on which side of it, was the rear platform of the caboose when plaintiff jumped off? *A.* (by jury). From one hundred to one hundred and fifty feet west of station. (3) Was the usual signal for stopping the train at Fairfax given the night of the accident? *A.* (by jury). Yes. (4) Had the brakeman applied the

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brakes on the caboose for the purpose of stopping the train before plaintiff jumped off? A. (by jury). Yes. (5) Was the train in the process of stopping at the time plaintiff jumped off? A. (by jury). Yes. (6) Did the conductor direct the plaintiff to jump off the train while in motion? A. (by jury). Yes; we believe he did. (7) Did either the conductor or brakeman tell plaintiff the train would stop at Fairfax? If so, which one of them? A. (by jury). We believe the conductor did. (8) Was the plaintiff intoxicated, either partially or otherwise, at the time of the accident? A. (by jury). No."

The answers to the third, fourth and fifth interrogatories are in full accord with the undisputed evidence. They show that the plaintiff was without excuse in jumping from the train. The answer to the sixth interrogatory could have been answered in a categorical manner, the same as those preceding it. For what reason a qualified answer was given we cannot tell. The answer was sufficient in form, it is true, but, in our opinion, there was no warrant in the evidence for any such finding. That this interrogatory ought to have been answered in the negative appears to be so well grounded as to amount to almost absolute demonstration.

REVERSED.

REID, MURDOCK & FISHER V. COWDUROY *et al.*

Sales: FRAUD: RESCISSION: INSTRUCTION. Where the supposed solvency of the purchaser of goods on credit is a material inducement to the sale thereof, and the purchaser makes false and fraudulent representations in regard to it, upon which the vendor, not knowing the truth, relies, in effecting the sale, it may be rescinded by the vendor as fraudulent, and the goods recovered back. An instruction in this case, to the effect that the vendor must also prove that the purchaser did not intend to pay for the goods when he bought them, is *held* to be erroneous. (See opinion for citations.)

Appeal from Montgomery District Court.—HON. A. B. THORNELL, Judge.

79	169
97	730
79	169
105	413
79	169
111	338
111	339
79	169
137	305

Reid, Murdock & Fisher v. Cowduroy.

FILED, JANUARY 29, 1890.

ACTION to recover the possession of specific personal property. There was a trial by jury, and a verdict and judgment for defendants. Plaintiffs appeal.

C. E. Richards, T. J. Hysham and Smith, Harl & McCabe, for appellants.

J. M. Junkin and S. McPherson, for appellees.

ROBINSON, J.—Defendant H. W. Cowduroy was engaged in the grocery business at Red Oak from August, 1887, to the fifteenth day of October, 1888. During that time he purchased goods of plaintiff. On the twenty-first day of August, the twenty-ninth day of September, and the sixth day of October, 1888, the plaintiffs shipped from Chicago to H. W. Cowduroy, at Red Oak, on his order, the property in controversy, consisting of merchandise of the value of \$371.73. The property was received and placed in stock, but the purchase price is unpaid. On the fifteenth day of October, 1888, H. W. Cowduroy executed to his father-in-law, the defendant L. Kirscht, a chattel mortgage on his stock of goods and other property, to secure notes amounting in the aggregate to fifty-three hundred and fifty dollars, besides interest. On the same day he executed a mortgage to the Fabyon Knife Company for a consideration of \$237.62, and also a third mortgage, which covered his stock in trade and other property, to his father, the defendant William Cowduroy, to secure the payment of two promissory notes which amounted to two thousand dollars besides interest. A mortgage on real estate was also executed in favor of the father at the same time, apparently to secure the same indebtedness. This action was commenced on the seventeenth day of October, 1888, to recover the goods in controversy, on the ground that they were obtained by H. W. Cowduroy through his false and fraudulent representations, made with intent to defraud the plaintiffs. They claim that when the

goods were ordered, shipped and received by H. W. Cowduroy he was, and for a long time had been, insolvent, and was unable to pay for the goods; that he knew that fact when he ordered and received the goods; that he ordered them with the intent not to pay for them, but to defraud the plaintiffs; that he concealed his insolvency and inability to pay for the goods, and his intent to defraud; that they sold and shipped the goods relying on his solvency and good faith, and not knowing of his insolvency nor of his fraudulent intent; that before bringing this suit they rescinded their contract of sale in consequence of the facts aforesaid, and are now the owners of the goods. It is conceded by appellees that the mortgages to Kirscht and William Cowduroy were given for antecedent debts, and that the mortgagees were not purchasers for value, without notice, but that they took only the title which the mortgagor had to give, and that, if plaintiffs are entitled to recover as against him, they are also entitled to recover as to the mortgagees.

I. The seventh paragraph of the charge to the jury is as follows: "Where the buyer of goods, at the time of or before the purchase, for the purpose of inducing the seller to part with his goods on credit, makes a material representation to the seller as to his financial condition, which representation is in fact false, and known by the buyer to be false when made, and which the seller relies upon in making the sale, and it is also shown that the buyer at the time intended by the representations to defraud the seller by not paying for the goods, such transaction would be fraudulent on the part of the buyer, and the seller could rescind the contract, and recover back the goods." The same rule was substantially given in other portions of the charge, so framed as to meet the facts of the case. Appellants complain of the charge on the ground that, to recover, they were required to show, not only that the buyer made false and fraudulent representations as to his solvency, upon which plaintiffs relied, but also that he did not intend to pay for the goods when he ordered them. The

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insolvency of the buyer when the goods were ordered does not seem to be seriously questioned. There can be no doubt that the burden imposed by the charge of the court is as claimed by the appellants, and we are required to determine whether a correct rule of law was announced. As a general rule, fraud in the sale of personal property entitles the party injured thereby to rescind the contract of sale. Story, Sales, secs. 379, 420, 445a; 1 Benj. Sales, sec. 636. It is contended by appellees that the charge is supported by the opinion in *Houghtaling v. Hills*, 59 Iowa, 287. In that case the petition alleged that the buyer was hopelessly insolvent when he purchased the goods, and unable to pay for them; that he knew that fact; that he knew the sellers did not know it, and that they would not have made the sale, had they been aware of it. But it was not alleged that the sellers were misled or deceived by any act or representation of the buyer. The question really involved in the case was whether the failure of the buyer to disclose his real financial condition was a fraud upon the seller; and the effect of the opinion is to hold that it was not, and that, inasmuch as the petition did not show that the goods were purchased with the specific intent not to pay for them, it did not state a cause of action. It did not decide that false and fraudulent representations as to solvency made on the part of the buyer, and relied upon by the seller, would not be sufficient ground to authorize the rescinding of the sale. Mere silence, where the person is under no obligation to speak, is not a legal fraud. 1 Benj. Sales, sec 640; Story, Sales, sec. 174. The cases of *Talcott v. Henderson*, 31 Ohio St. 162; *Nichols v. Pinner*, 18 N. Y. 297; and *Garbutt v. Bank*, 22 Wis. 390, are in point. But where goods are sold there is a promise expressed or implied on the part of the buyer to pay for them; and the seller has a right to rely upon the presumption that the buyer intends to perform his obligations by making payment. Therefore, if the latter entertains a secret intent to not make payment, that intent, and his failure to

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disclose it, constitute such a fraud as will entitle the seller to rescind the sale. *Oswego Starch Factory v. Lendrum*, 57 Iowa, 581; *Lindauer v. Hay*, 61 Iowa, 665; *Nichols v. Michael*, 23 N. Y. 266; *Hennequin v. Naylor*, 24 N. Y. 140; *Dow v. Sanborn*, 3 Allen, 182; *Belding v. Frankland*, 8 Lea, 67. See, also, *Lee v. Simmons*, 65 Wis. 526, 27 N. W. Rep. 174; *Donaldson v. Farwell*, 93 U. S. 631. The supposed solvency of the purchaser is usually a material inducement to the sale of goods; and where it is, and the purchaser makes false and fraudulent representations in regard to it, upon which the vendor, not knowing the truth, relies, in effecting the sale, it may be rescinded by the vendor as fraudulent. The charge of the court under consideration was erroneous in requiring plaintiffs to prove two material facts, when proof of one was sufficient to enable them to recover. There was evidence which tended to show that H. W. Cowduroy was insolvent when he ordered the goods; that he must have known that fact, and that he would be unable to pay for them; and also that he made false representations in regard to his assets and liabilities, for the purpose of obtaining credit, which were relied upon by plaintiffs in making the sales; and that they were made to a commercial agency, which was engaged in the business of furnishing to plaintiffs and others information in regard to the financial standing of business men throughout the country. The charge may therefore have been prejudicial.

II. Appellants complain of the refusal of the district court to give an instruction to the jury which was asked by them. There was no error in the refusal. The instruction was based in part upon assumed facts, of which there was no evidence, and omitted an essential element in reciting facts which would constitute fraud sufficient to authorize the rescission of the sale.

III. Other questions are discussed by counsel, but, as they are not likely to arise on another trial, need not be determined. For the errors specified, the judgment of the district court is

REVERSED.

79	174
92	213
79	174
110	488
79	174
122	58

MORGAN V. WAGNER.

Appeal: NEW TRIAL: WEIGHT OF EVIDENCE. Where a motion for a new trial is granted on the ground that the verdict is not sustained by the evidence, this court will not interfere, unless it clearly appears that injustice has been done, and the discretion of the court below abused. (See opinion for citations.)

Appeal from Polk District Court.—HON. MARCUS KAVANAGH, JR., Judge.

FILED, JANUARY 30, 1890.

ACTION by an attorney at law to recover for professional services and money advanced for defendant's benefit. Defendant denied the allegations of the petition, and pleaded a counter-claim for money received by plaintiff for her use. A verdict was had for plaintiff in a small sum, which, on motion of defendant, was set aside. Plaintiff appeals.

W. A. Spurrier, for appellant.

H. G. Carpenter and Macy, Sweeney & Jones, for appellee.

BECK, J.—I. The motion for a new trial was based upon the ground, among others, that the verdict was not sustained by sufficient evidence. The abstract shows that "judgment was entered sustaining said motion to set aside the verdict of the jury rendered herein, on the ground that the verdict was not sustained by sufficient evidence." The case is one where the court below set aside the verdict for want of sufficient evidence to support it.

II. The evidence was conflicting, and the court below could well have found, in the exercise of its lawful discretion, that the verdict was not supported by the evidence. The trial court is charged in such cases with a large discretion. It has, usually, the

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witnesses before it, and, for this and other reasons, is better able to weigh the evidence, and determine upon the credit to be given to the witnesses, than the appellate court. Where motions of this character are sustained, we will not interfere, unless it clearly appears that injustice has been done, and the discretion of the court below has been abused. Nothing of the kind appears in this case. In support of these conclusions many prior decisions of this court, including the following, could be cited: *Donahue v. Lannan*, 70 Iowa, 73; *Lytton v. Railway Co.*, 69 Iowa, 339; *Rogers v. Winch*, 65 Iowa, 168; *Engs v. Priest*, 65 Iowa, 232; *Brett v. Bassett*, 63 Iowa, 340; *Moran v. Harris*, 63 Iowa, 390. In our opinion, the judgment of the district court ought to be

AFFIRMED.

79	175
82	135
83	685

OSBORNE V. REARDON.

Execution: SUPPLEMENTARY PROCEEDINGS: PARTIES. Sections 8135 to 8149 of the Code, providing for an examination of a judgment debtor for the discovery of his property, do not contemplate or authorize the examination of third parties; and where the wife of the judgment debtor was in such proceedings cited to appear and was examined, and the debtor was, as a result of the examination, adjudged to be the owner of certain property which was in the possession of the wife, and which she claimed to be her own, such judgment, and an order that the debtor turn it over to satisfy the judgment, were of no effect upon the wife, as she was not a party to the proceeding, and could not be bound thereby.

Appeal from Decatur District Court.—HON. R. C. HENRY, Judge.

FILED, JANUARY 30, 1890.

THIS is an appeal by the defendant from certain orders made by the court below in proceedings auxiliary to execution. The facts appear in the opinion.

Parrish & Hoffman, for appellant.

Marion F. Stookey and *John W. Smith*, for appellee.

ROTHROCK, C. J.—It appears from the record before us that the plaintiff is the owner of a judgment against the defendant; that execution issued upon said judgment, and was returned unsatisfied. Thereupon the plaintiff presented to the district court a sworn petition, in which it was alleged that the defendant had property in Decatur county which he unjustly refused to apply to the satisfaction of the judgment, and that Jane Reardon, the wife of the defendant, held a large amount of personal property belonging to said Thomas Reardon, which was transferred to her for the purpose of delaying and, if possible, preventing the plaintiff, by the usual process of execution, from making his claim out of said property of defendant, Thomas Reardon. The petition asked that both the defendant, Thomas Reardon, and Jane Reardon, be required to appear and answer, as required by law, before a referee to be appointed by the court. An order was made appointing a referee, and the defendant, Thomas Reardon, and Jane Reardon, his wife, were asked to appear before the referee for examination touching the averments of the petition. A hearing was had before the referee, in which a large number of witnesses were examined; and a report was made that Thomas Reardon was the owner of about seventy-five cattle and ten horses which were not exempt from execution. Exceptions were filed to the report, which were overruled, and a receiver of the property was appointed, and Thomas Reardon was ordered to turn over the property to the receiver, to be sold in satisfaction of the plaintiff's judgment.

It will be observed that the proceedings were founded on section 3135 to section 3149 of the Code, by which a judgment debtor may be examined before the court or a referee touching any property which it is alleged he unjustly refuses to apply towards the satisfaction of a judgment. Although the defendant's wife was ordered to appear and answer, it is not claimed that she was a party to the proceeding. It appears from the evidence in the case that the wife is the owner

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of a farm, and that the cattle and horses in question were kept upon the farm. The husband and wife both claimed that the property in controversy belonged to her. The referee reported that the property belonged to the husband. The sections of the statute above referred to make no provision for making third persons parties to the proceedings. Ample provision is made for such a proceeding in the equitable action provided for by sections 3150-3153 of the Code. The evidence tends to support the finding of the referee; and, so far as the rights of the defendant are involved, we discover no error in the rulings of the court, nor of the referee.

It is claimed that the referee was disqualified to act, on account of having been an attorney against the defendant, and prejudiced against him. This claim does not seem to us to be well founded.

It is urged that the statute under which the proceeding was had is unconstitutional; but the contrary was held in *Eikenberry v. Edwards*, 67 Iowa, 619.

We do not discover any ground upon which this cause can be reversed; and, at the same time, we must say that the whole proceeding appears to us to be of very little consequence as an aid to plaintiff in the collection of his judgment. It is true he has an adjudication against the defendant which estops him from claiming that the property ought not to be applied to the payment of the judgment. But he has no adjudication against the wife as a claimant of the property. He could just as well have ordered the sheriff to levy upon the property before this order as afterwards. He could have indemnified the officer, if necessary, and compelled the wife to assert her rights by replevin or otherwise. She has had no day in court, and her rights are in no manner affected by the order. We have thought it our duty to say this much, because counsel for appellee appear to be of opinion that the order appropriates the property. The order of the district court will be

AFFIRMED.

In re ESTATE OF GABLE.

79	178
88	497
79	178
128	123

1. **Estates of Decedents: ANCILLARY ADMINISTRATORS: WHO ARE.** Where a resident of Pennsylvania died testate in that state, owning land and personal property there, and also land in Iowa, and executors were there appointed, and creditors residing there established their claims against the estate, and administration was afterwards taken out in Iowa at the request of the executors, to the end that the Iowa lands might be sold for the payment of the debts of the estate, *held* that the Iowa administration was ancillary to that of Pennsylvania. (See opinion for citations.)
2. **——: PRINCIPAL AND ANCILLARY ADMINISTRATIONS: DISPOSITION OF ASSETS.** In such case all the Iowa lands were sold, producing a sum far in excess of the claims filed against the ancillary administrator, but the sale was ordered upon a petition which showed a large unpaid indebtedness against the principal administration. *Held* that it was the duty of the ancillary administrator, after paying all just claims filed against him, and the expenses of his administration, to transmit the residue of the assets in his hands to the principal administrator, to be applied upon unpaid claims in Pennsylvania, and that, while the principal administration was unable to meet the just demands against it, the heirs and legatees of the decedent were not entitled to such residue. (See opinion for citations.)

Appeal from Tama District Court.—HON. S. H. FAIRALL, Judge.

FILED, JANUARY 30, 1890.

THE heirs, legatees and devisees of John S. Gable, deceased, filed their petition in the district court of Tama county, sitting as a court of probate, praying that the executor of the estate of said deceased, appointed by said court, be ordered to make distribution of the assets in his hands, as required by the will of the testator. An order, as prayed for by the petition, was made. Administrators of the estate, appointed in proceedings in Pennsylvania, claimed to be the principal administration, intervene, claiming the assets asked to be distributed. They appeal to this court.

C. B. Bradshaw and Charles A. Clark, for appellants.

Struble & Stiger and J. W. Willett, for appellee.

BECK, J.—I. There is no dispute as to the controlling facts in the case. Indeed, there is no real controversy as to any of the facts, the dispute arising wholly upon the law as applicable to the facts. Briefly stated, but with sufficient fulness, the facts in the case demanding consideration are these: John S. Gable, always a resident of Pennsylvania, died in that state August 11, 1881. He owned property in Pennsylvania and lands of great value in Iowa, some of them situate in Tama county. He was at the time of his death largely indebted, and, as it now appears, was insolvent, the assets of his estate being sufficient to pay but an inconsiderable portion of his indebtedness. He left a will devising his property almost exclusively to his wife and children. The particulars of this disposition of his property by his will need not be stated. The will authorized the executors to sell and convey the real estate, to the end that the estate "be settled up as advantageously and profitably as possible" within four years. The executors named in the will were discharged, and on the twenty-seventh day of December, 1881, others were appointed by the proper court in Pennsylvania. At their request an administrator was appointed by the proper court of Tama county, who soon after resigned, and on the eighth day of April, 1882, R. E. Austin was appointed administrator by the same court, and proceeded in the discharge of his duties as such. It is shown that administration was taken out in this state in compliance with the request and direction of the Pennsylvania administrators, and was intended to be ancillary. Claims to a large amount were filed against the estate in Pennsylvania, and were paid, so far as the assets were sufficient; but the large portion of the claims after the assets were exhausted

remained unpaid. Claims were filed against the estate in Iowa, and, upon the petition of the administrator, lands of great value were sold, and the proceeds applied to the payment of the claims filed and proved here. A large balance remained in the hands of the Iowa administrator, which the petitioners in this case pray may be distributed to the heirs and devisees of the decedent. The Pennsylvania administrators intervene in this action, claiming that the principal administration in the case was in Pennsylvania, and the Iowa administration was merely ancillary. They pray that the money assets in the hands of the Iowa administrator may be transmitted to them, to be used in the payment of the debts of the estate which have been or may be duly proved.

II. The evidence shows, we think, beyond dispute, that the Iowa administration was taken out upon the request of the Pennsylvania administrators, and was intended by them and the Iowa administrator to be ancillary. The Iowa administrator, in his petition for the sale of Iowa lands, states that debts to the amount of ninety thousand dollars in excess of assets are filed against the estate in Pennsylvania, and that claims against the estate in Iowa to the amount of seven thousand dollars were proved. It is shown that the Iowa administrator has in his hands more than nineteen thousand dollars after paying claims allowed by the Iowa court, seven thousand dollars being received for rents, and the balance from sales of lands. There seems to be no doubt that the Pennsylvania claims against the estate constituted the ground upon which the order for the sale of the lands was made. The petition for the sale is based upon that ground, among others, and there can be assigned no other reason why the court ordered Iowa lands to be sold, realizing nineteen thousand dollars in excess of the Iowa claims. Unless such was the purpose, the order was improvident and erroneous, in that it required a sale of lands so largely in excess of the demands against the estate. But we will presume

the existence of facts, in the absence of proof to the contrary, which establish the regularity of the order of sale.

III. We are now to determine what disposition ought to be made of the money assets in the hands of the Iowa administrator, being the proceeds of Iowa lands sold upon his petition, as above stated. The Pennsylvania administrators, who intervene, claim that this money should be transmitted to them to be disbursed in the payment of debts against the estate, duly established in accord with the laws of Pennsylvania. The heirs and devisees, who institute this proceeding by their petition, claim that the money assets in the hands of the Iowa administrator should be distributed to them, and no part of it be applied in payment of Pennsylvania creditors.

IV. The testator was a resident of Pennsylvania, and died in that state. He owned and held personal property there, and was seized of lands situated therein. Administration was first taken in Pennsylvania, and creditors residing there, in accord with the laws of that state, established their claims against the estate. Administration was afterwards taken out in Iowa, at the request of the Pennsylvania administrator, to the end that the lands owned by the testator in Iowa should be appropriated to the payment of the debts of the estate. Under these facts no doubts can be entertained that the Pennsylvania administrator is the principal, and the Iowa the ancillary, administrator. *Chamberlin v. Wilson*, 45 Iowa, 149; Story, Conf. Laws, sec. 518; Whart. Conf. Laws, sec. 627; 3 Williams, Ex'rs [6 Am. Ed.] 1762; *Stevens v. Gaylord*, 11 Mass. 256; *Fay v. Haven*, 3 Metc. 109; *Williams v. Williams*, 5 Md. 467; *Clark v. Clement*, 33 N. H. 563; *Green v. Rugely*, 23 Tex. 539; *Spraddling v. Pipkin*, 15 Mo. 118; *Childress v. Bennett*, 10 Ala. 751; *Perkins v. Stone*, 18 Conn. 270.

We are not required to consider the functions and duties of the principal and ancillary administrations, further than to inquire as to the disposition to be made

of assets in the hands of the latter, after all debts of the estate established therein have been paid. It may here be remarked that the duties of the ancillary administration are not prescribed by statute, and that the common law prescribes those duties in obedience to the obligations of comity existing between independent states. It is true that courts are not commonly considered as bound to obey the laws of comity; that they are enforced through the spirit of friendship, and not in obedience to the requirements of superior law. This is quite true. But there is an obligation wherever the laws of comity rest which impels courts to enforce them with an authority not to be disregarded, though it be not prescribed by statute or by the common law. That obligation exists when justice demands authority to be exercised to the end that right may prevail; that property and property rights, domestic rights, and the liberty of the citizens may be protected and enforced. A court of justice, which is established that justice may be enforced and upheld, can have no more binding obligation resting upon it than that which requires that it shall do justice.

V. What is an ancillary administration? It is subservient and subordinate to the principal administration. The subserviency and subordination is to attain the ends of justice, which is the object and aim of all acts of a court of justice. The terms relate to the objects and ends attained by the administration, not to the methods and practice pursued by the courts having jurisdiction of the administration. Under the law upon the subject, which prevails over the whole Union, all the property of a decedent, including his lands, except a homestead and other exemptions, is subject to the payment of his debts, and is assets for that purpose. Debts must be paid before the assets can be distributed to the heirs, legatees and devisees, without regard to the place of residence of the creditors. Justice requires that creditors should be paid when they have duly established their claims. Such claims may be established

either in the principal or ancillary administration. They will be paid when established in the ancillary administration, if assets sufficient are found within its jurisdiction. If sufficient assets for the payment of debts are not found under the control of the principal administration, and there is under the control of the ancillary administration money assets in excess of the debts proved therein, justice would forbid that such administration should disregard the demands of right, and distribute the assets to the heirs; but, as it has not before it the claims of all the creditors, some having been established in the principal administration proceedings, justice demands that the ancillary administration, in response to the demands of comity, transmit the money assets to the principal administrator. Story, Conf. Laws, secs. 513, 518; Whart. Conf. Laws, secs. 619, 620; 3 Williams, Ex'rs, 1763, 1767, and notes; 1 Williams, Ex'rs, 424; *Goodall v. Marshall*, 11 N. H. 88; *Low v. Bartlett*, 8 Allen, 259; *Fay v. Haven*, 3 Metc. 109; *Davis v. Estey*, 8 Pick. 475.

VI. As we have before said, lands now in all the states of the Union, except such as may be exempted by law, are assets for the payment of the debts of a decedent. They are sold, and the money proceeds are applied to the payment of the decedent's debts. It is vain to discuss the question whether the avails of land so sold are to be treated as personalty or real estate. The land is converted into money. The land then ceases to be assets of the estate; the money becomes assets. There is no mystery in changing lands into money. One owning a farm knows he owns and is possessed of so many acres of land. He sells it, and receives therefor ten thousand dollars in cash. He then knows he owns no lands, but in the place of his farm he has ten thousand dollars in cash. He would probably be amused should any one claim that his money was realty, or should be regarded and treated by the law as realty. The law provides for the change of the lands of estates into money. When the money is received, it is personal

In re Est. of Gable.

property. It doubtless is true that cases arise where, in order to enforce liens or equities, money proceeds of lands are appropriated as the land would have been appropriated had there been no sale of it. It appears that there ought to be no doubt, obscurity or mystery as to the character of the money and the appropriation of it to be made. It is avails of land set apart by the law for the payment of debts of the estate. The land was converted into money, as shown by the petition filed in the ancillary administration, asking for the sale of the Iowa lands, for the purpose of paying debts proved in both the principal and ancillary administrations. If there had been no debts, the land would not have been sold, and all the land would not have been sold except to pay the Pennsylvania creditors. It is now found that, after the ancillary administrator has paid all debts established therein, a surplus remains. To carry out the purpose of the law and the objects for which the land was sold, the balance in the hands of the ancillary administrator must be transmitted to the principal administrator in Pennsylvania.

Our conclusions as to the character of the residuum of the money assets in the hands of the ancillary administrator, and the disposition to be made of it, demand for their support no further argument and no further citation of authorities. Exhaustive, learned and acute arguments of the respective counsel, and numerous authorities cited by them, bearing upon the questions discussed, need not, therefore, be further considered.

Our conclusions require the decree of the district court to be reversed. The cause will be remanded to the district court for a decree in harmony with this opinion, directing and requiring the administration appointed in this state to transmit to the principal administrator in Pennsylvania all funds remaining after the payment of all debts proved in the district court, and costs and expenses of administration.

REVERSED.

In re ESTATE OF PEET.

1. **Estates of Decedents: ALLOWANCE TO WIDOW: ANTENUPTIAL CONTRACT.** An antenuptial contract provided that during the marriage of the parties neither should be restricted in the control or disposition of his or her property, real or personal, and that either might execute deeds of conveyance without the consent or signature of the other, the same as if unmarried; that the wife should claim no right of dower or homestead in any property of the husband's estate, in case she should survive him, but that, in that case, she should be paid a certain named annuity out of the estate. *Held* that the clause as to the right to dispose of property did not refer to or include a disposition by will, and that the contract, followed by a will in which the stipulated annuity was alone given to the widow, did not defeat her right to an allowance to a year's support, under section 2875 of the Code.
2. ———: ———: **AMOUNT: MATTERS TO BE CONSIDERED.** An allowance for the support of the widow for one year after the death of the decedent, under section 2875 of the Code, is to be made only when necessary, but the necessity is to be determined largely from the facts of each particular case; and it is proper to consider the resources of the petitioner in her own right, the extent of the estate, the demands upon it, the health of the petitioner, her station in society, and such other matters as are necessary and reasonable. In this case an allowance of eight hundred dollars to a widow without children is *held* not to be erroneous, the estate being worth thirty thousand dollars.
3. ———: ———: **PRIORITY OF CLAIM.** It is no valid objection to making an allowance for the temporary support of a widow, under section 2875 of the Code, that the property has all been disposed of by will, which has been admitted to probate, and that, therefore, there is nothing out of which to pay the allowance; for, when necessary to be made, it is to be paid in preference to the debts of the estate, and these are preferred to the rights of the legatees. (See opinion for citations.)

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, JANUARY 30, 1890.

PROCEEDING in probate, in which Matilda Peet, as widow of J. M. Peet, deceased, seeks an allowance for support under the provisions of the statute. The

79	185
87	271

79	185
88	15

79	185
89	316

79	185
132	667

79	185
143	123

estate of J. M. Peet, at his death, consisted of upwards of thirty thousand dollars, mainly of notes and real estate. By the terms of his will the petitioner was to receive, while she remained his widow, the interest of three thousand dollars. All of the remainder of his property was bequeathed to his children. The provisions of the will in favor of the wife are as follows: "Before my marriage to my present wife, Matilda Peet, I made an agreement with her wherein provision was made for her out of my property, which antenuptial contract was filed and recorded in the office of the recorder of Jones county, in book 44, page 477; and I direct that my son William G. Peet pay to her the interest upon the money annually or oftener, as she may call for it, during the lifetime of my said wife, as provided in said antenuptial contract. And I give and bequeath to my said wife, Matilda Peet, during her life, in case she remains my widow, the interest upon three thousand dollars, said interest to be paid to her as above directed, unless she shall marry again, and in such case the same shall cease, and she shall not be entitled to anything thereafter." The following is the antenuptial contract referred to: "Article of agreement made and concluded this third day of July, A. D. 1877, by and between James M. Peet, of Fairview, Jones county, Iowa, party of the first part, and Matilda Weaver, of Anamosa, Iowa, party of the second part, witnesseth: That in consideration of a promise of marriage by and between said parties it is hereby mutually agreed by and between said parties that during their marriage neither party shall, in any manner, be restricted in the control or disposition of their property, both real and personal, which they have or may hereafter acquire; and either may execute deeds of conveyance without the consent or signature of the other, the same as if unmarried. And said second party, in consideration of aforesaid, hereby agrees to claim no right of dower or homestead in or to any property which shall belong to the estate of said party of the first part at the time of his decease, provided she shall survive him. And said

In re Est. of Peet.

first party, in consideration of the promise aforesaid, hereby agrees that, in case said second party shall survive said first party, said second party shall be allowed and paid out of the estate of said first party, by his executors or heirs, the interest on the sum of three thousand dollars (\$3,000); which interest shall be paid annually from and after my decease during the widowhood of said second party." Other facts as to the health and financial condition of the petitioner appear in the record, which may be referred to in the opinion. The foregoing statements are sufficient for the main question in the case. The district court made an allowance of eight hundred dollars to the petitioner. The executor appeals.

Ezra Keeler and J. W. Jamison, for appellant.

Remley & Ercanbrack, for appellee.

GRANGER, J.—I. The question is first presented as to the right of the court to make any allowance because of the contract and the provisions of the will. The effect claimed for them is that they divest the court of any authority to make an allowance, under the provisions of the Code, section 2375, even though the facts, under other circumstances, would require it. In other words, as to the petitioner, they supersede the purpose of the statute. It is very manifest that the testator's purpose in the will was to carry out the terms of the antenuptial agreement, and that the limitations of the will as to the right of the petitioner are no greater than a fair construction of the agreement will warrant. To a clear understanding of appellant's claim, and the language of the agreement, relied on for its support, we quote a clause in his argument, which includes the language of the contract: "Our position is that the contract, in express terms, gives the right to dispose of all the property that he then owned or might afterwards acquire, and such right is given in the following clause of the contract: 'During their marriage neither party shall in any manner be restricted in the control or disposition of their property, both real and personal, which

1. ESTATES of
decedents:
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tract.

they have or may hereafter acquire, and either may execute deeds of conveyance without the consent or signature of the other, the same as if unmarried.''' It is then urged that the right of disposition includes a right to dispose of it by will, and, as we infer, such being the effect of the contract, the will must receive that construction. This leads us directly to a construction of the contract as bearing on the point.

We think a fair consideration of the question involves a consideration of other language in the contract than that quoted; but without other language it is exceedingly doubtful if it would bear the construction claimed for it. It must be understood that contracts designed to divest the wife of the benefits of the statutes in her favor, after the death of her husband, and especially a statute providing for a necessary support, immediately following such death, must not be of doubtful interpretation, but specific and certain as to such intent. In general, the provisions of the statute in this respect embrace interests, not alone personal to the wife, but to the children, and in a sense to the public, and a law thus designed is to be guarded with caution. In this case there are no children to be affected, but in the approval of contracts, by which its provisions may be set aside, the general purpose and scope of the law is to be kept in view. The language of the contract quoted by appellant is but a single sentence, and was a provision for the disposition of property "during their marriage;" and the last clause of the sentence is, "and either party may execute deeds of conveyance without the consent or signature of the other, the same as if unmarried." There is nothing in the language referring to a testamentary right, and the language is such as naturally applies to the disposition of property otherwise than by will. The clause "during their marriage" is a limitation as to time, and is entirely unnecessary, and to be disregarded, in effect, if the construction urged is to obtain. A reference to the sentence, with such words omitted, will show how useless they are for the construction claimed. In fact,

it seems to us more than useless, as they seem to impress the sentence with a different meaning. We think it cannot be successfully claimed that the mere execution of a will during the life of the testator is the disposition of property. Of course, it is a step in that direction, but the property is not disposed of until the will becomes operative by the death of the testator. While the testator lives, he owns and controls the property. He may revoke the will at pleasure. During the life of the testator, how much more does a will dispose of his property than the law would dispose of it without the will? Each fixes the *status* of his property at death. They become effective as to an estate at the same time. As to the intestate the law stands in lieu of a will, and this is true both before and after the decease. A principal purpose of a will is to change the direction of the law as to the descent of property; and in its absence we assume that the provisions of the law are satisfactory, and adopted in its stead. It seems to us very clear that the mere execution of a will was not within the intent of the parties,—a disposition of property during marriage.

The contract, however, furnishes other reasons for believing the parties did not so intend. The careful reader of the contract will observe that it attempts: *First*, to provide for the mutual rights of the parties; and, *second*, to provide for the rights of the wife in the property of the husband after his death. Hence it will be seen that they are expressly contracting with reference to a subject that should, and naturally would, embrace the one under consideration. There is an express relinquishment of dower and homestead right in or to any property of the estate. While thus contracting as to her rights under the provisions of the law after his death, and specifying what should not be claimed, we must assume that if more had been intended it would have been expressed. The allowance claimed is not embraced in the dower, and, of course, not in the homestead. *Mahaffy v. Mahaffy*, 61 Iowa, 679. The cases of *Olleman v. Kelgore*, 52 Iowa, 38, and

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Otto v. Doty, 61 Iowa, 23, are not in conflict with this view. Those cases refer to the effect of a will after death and before probate. We do not say that the will at death would not have operated to dispose of the property, but it would not have been a disposition during marriage as contemplated by the contract. Inasmuch as the record discloses a probability of litigation as to the homestead, we refrain from any such consideration of the case before us as would in any manner intimate an opinion or prejudgment as to the question of either homestead or dower. With our view of the contract, the district court was not precluded by it from making an allowance to the widow, if otherwise entitled under the law.

II. It is urged that the provision of the will in favor of the petitioner is sufficient for her support without any allowance. The will gave her the interest of three thousand dollars, and it is doubtful if more than six per cent. could be realized, as the will specifies no rate per cent. It has been held that the district court has a discretion as to such allowances. *Caldwell v. Caldwell*, 54 Iowa, 457. We should not interfere where such discretion is fairly exercised. The testator was possessed of a good estate, and with his wife, until a few days before his death, kept a home where she continued to reside afterwards, at least a part of the time. In saying whether or not petitioner should have an allowance, it was proper for the district court to consider the resources of the petitioner in her own right; the allowance made her by the testator; the extent of the estate; the demands upon it; the health of the petitioner; her station in society; and such other matters as are necessary and reasonable. We assume that every husband designs this much in favor of his wife. The allowance is only to be made if necessary. Code, sec. 2375. The necessity is to be determined largely from the facts of each particular case. The district court, with the facts before it, adjudged an allowance necessary, and, in view of the record, we think justly so. Is the allowance too much?

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First Nat. Bk. of Grundy Center v. Snyder Bros.

It seems liberal, and yet, in view of the health of the petitioner, the extent of the estate, the scanty supply of provisions left by the executors, and, if petitioner shall be compelled to rent a home, her right to the homestead being questioned, we are not prepared to say that it is. It is not for us to say that the petitioner shall take just enough to board and clothe her in the most economical way, that legatees, who have before been abundantly provided for from the estate, may take more. We should rather sustain the action of the district court in such an allowance as in its judgment will yield a support commensurate with the wants and the rights of the petitioner, when to do so is not to deny creditors a full payment, nor a support to those dependent on the estate for it. In view of the facts, we are not disposed to disturb the amount of the allowance.

III. It is said that the law contemplates an allowance from the property of the estate (Code, sec. 2375), and that, as the property is disposed of by will, which has been admitted to probate, there is no property as a basis for the allowance. This allowance, when necessary, is to be paid in preference to the debts of the estate, and the latter are preferred to the rights of the legatees. *Estate of Dennis*, 67 Iowa, 110; *Estate of McReynolds*, 61 Iowa, 586. The action of the district court is

AFFIRMED.

THE FIRST NATIONAL BANK OF GRUNDY CENTER V.
SNYDER BROS. *et al.*

79	191
93	445
79	191
97	496
79	191
136	394

Evidence: CONTRACTS: CONSIDERATION: PAROL TO VARY WRITING.

Parol evidence is never admissible to alter, vary or contradict a written contract, but it is admissible to show what the consideration was, unless the consideration is expressed in the instrument in such unmistakable language that parol evidence is not necessary to understand it. But where several instruments constituted parts of one transaction, and were to be considered together as such, and each instrument taken separately clearly expressed the

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consideration for which it was made, but when taken together as parts of the same transaction it did not clearly appear what the consideration was, *held* that parol testimony was admissible to show the real consideration. (See opinion for citations and for application of the rule.)

Appeal from Grundy District Court.—HON. C. F. COUCH, Judge.

FILED, JANUARY 30, 1890.

ACTION in equity asking certain foreclosures, and for other relief. The case was submitted upon the issues joined on plaintiff's substituted and supplemental petitions, and the answers of the defendants thereto, and decree entered in favor of the plaintiffs, from which the defendants Snyder Bros., H. P. Snyder, J. M. Snyder, and A. N. Woods, assignee of Snyder Bros., appeal.

It appears without controversy that Snyder Bros., a partnership doing business as hardware merchants, and J. M. Snyder, individually, were indebted to the plaintiff bank in the sum of about five thousand dollars, evidenced by notes and an account for which plaintiff was insisting on security, and to secure which they requested a mortgage on Snyder Bros.' stock of goods, which they declined to give because of the effect it would have upon their credit. J. M. Snyder, who transacted the business under consideration on behalf of his firm, being the owner of the premises upon which their business was carried on, and of certain other lots, on the twenty-first day of April, 1886, executed his two warranty deeds therefor to the plaintiff; his wife, Anna C., joining therein. The consideration named in the deed for the storehouse property is two thousand dollars, and in the other, seven hundred dollars. On the same day, and as a part of the same transaction, the plaintiff executed to J. M. Snyder its two bonds, in one of which it agreed to convey to him said storehouse property upon payment of two thousand dollars on or before April 21, 1891, with ten per cent. interest,

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payable annually, according to the tenor of his certain promissory note; he to keep the property insured for two thousand dollars for the benefit of plaintiff, and pay all taxes; non-payment of any of the sums within twenty days after due to entitle plaintiff to declare the contract at an end. By the other bond the plaintiff agreed to convey to J. M. Snyder the other lots deeded to it, upon the payment of seven hundred dollars on or before April 21, 1891, with ten per cent. interest, payable annually, according to the tenor of his promissory note, Snyder to pay all taxes, and a failure to pay any of the sums for twenty days to entitle plaintiff to declare the contract at an end. At the same time J. M. Snyder executed to plaintiff the two promissory notes of Snyder Bros.,—one for two thousand dollars and one for seven hundred dollars,—due “on or before five years after date,” with ten per cent. interest, payable annually; and the plaintiff gave to him a receipt against a note for two thousand dollars, and surrendered to him a note for four hundred dollars, and applied the balance on interest and by credit on deposit account. On the same day, and as a part of the same transaction, a “duplicate lease and agreement” was executed by the plaintiff and Snyder Bros., whereby the plaintiff leased to John M. Snyder and H. P. Snyder said storehouse property for five years from that date, at the yearly rent of six hundred dollars, payable monthly, in advance; Snyders to keep the building insured for two thousand dollars for the benefit of the bank; a failure to do which should work a forfeiture of the lease. It is further agreed therein by Snyder that plaintiff should have a lien upon all fixtures, stocks or merchandise kept or used on the premises, for rents due or to become due, whether exempt from execution or not, and that, in case of failure on their part to keep all the covenants, the plaintiff might, at its option, declare the lease void. The actual rental value of the storehouse property was twenty-five to thirty dollars per month. Snyder Bros. remained in possession until December 10, 1886, when

they made a general assignment for the benefit of their creditors, since which their assignee has had control and possession, and received the rents. Snyder Bros. failed to pay the taxes assessed against the storehouse and personal property, and to keep the same insured, whereupon plaintiff, to preserve its security, paid the taxes and took out insurance.

On December 22, 1886, Snyder Bros. executed a chattel mortgage to the Iowa Barb & Steel Wire Company on their stock of goods, to secure the payment of \$990.82. The personal property was sold under stipulation by the assignee, the proceeds to be held to abide the orders of the court. The decree entered June 7, 1888, against Snyder Bros. and J. M. Snyder and H. P. Snyder is: (1) Judgment in favor of plaintiff for \$2,492.43, with interest at ten per cent. on \$2,455.66, and six per cent. on \$36.77, from date, with foreclosure of the title-bond on the storehouse property. (2) Judgment in favor of plaintiff for \$866.53, with interest at ten per cent. on \$855.97, and at six per cent. on \$10.56 thereof, from date, with foreclosure of the other title-bond, and barring defendants, and all claiming under them, from all rights except the right to redeem. (3) Judgment in favor of the plaintiff, for \$2,757.28, with interest at ten per cent. on \$2,616.17, and at six per cent. on \$142.15, thereof, from date, and declaring the same a lien upon the personal property described in the lease, and ordering the application of the proceeds of the sale thereof to the payment of said judgment. (4) Judgment in favor of the Iowa Barb & Steel Wire Company for \$1,107.01, with interest at eight per cent., and declaring the same a second lien on said personal property.

Rea & Hayes, for appellants.

Boies, Husted & Boies, for appellee.

GIVEN, J.—I. Appellants' contention is that said several instruments were executed as parts of one transaction, and must therefore be construed together; that

thus construed they show that the consideration for the deeds and bonds was the extension of time on the twenty-seven hundred dollars indebtedness, and as security therefor, thus constituting an equitable mortgage; and that the consideration for the lease was the extension of time for the balance of the indebtedness due to plaintiff, and as security therefor. Appellants also contend that, as a part of the same transaction, it was orally agreed between the parties that such were the considerations and purposes of said instruments. Appellee contends that the agreement was that payments on the lease would be applied in discharge of the two-thousand-dollar note, and not upon any other of the indebtedness. On the hearing appellee was permitted, over appellants' objections, to introduce evidence tending to show an oral agreement, as claimed by appellee, and appellants introduced evidence tending to show that the oral agreement was as claimed by them.

II. It is a familiar rule that written contracts shall not be changed, varied or contradicted by contemporary or prior oral agreements. *Lormer v. Allyn*, 64 Iowa, 727; *McClelland v. James*, 33 Iowa, 578; *De Long v. Lee*, 73 Iowa, 54. In *Day v. Lown*, 51 Iowa, 366, it was held "that parol evidence is admissible to prove that the consideration is other and different from that stated in the deed." *College v. Bryan*, 50 Iowa, 294, was an action upon a promissory note to the college for five hundred dollars, "for value received, with eight per cent. interest, payable at the office of the treasurer of said college on the first day of January and July of each year." One of the defenses pleaded was that the amount promised was a gift to the endowment fund, and promised in consideration of an agreement that all the funds donated for the endowment should be used exclusively for that purpose, and that the fund contributed had been diverted from that purpose. This court, after quoting from *Atherton v. Dearmond*, 33 Iowa, 353, say: "In the case before us the contemporaneous contract—namely, the agreement

for the preservation and proper use of the endowment fund, pertains to the consideration of the note in suit, and reaches no further." In *De Long v. Lee*, 73 Iowa, 54, it is said that the parol agreement pleaded as a defense, and supported by proof, did not pertain to the consideration of the note; thus implying that a different rule applies when the defense is as to the consideration. *Courtwright v. Strickler*, 37 Iowa, 382, was a promise to pay "two hundred dollars ten days after the complete construction of its railway, and the running of the cars over the same, to a point within three-quarters of a mile of the corporate limits of the town of Centerville." The principal contention was whether the conditions on which payment was to be made had been complied with,—the defendant contending that it was on the completion of the road to its terminus, Kansas City; the plaintiff contending that it was to Centerville only. The defendant proposed to prove what the consideration was, but was not permitted to do so. This court says: "The considerations are expressed in the instruments in unmistakable language, and parol evidence is not necessary in order to understand it, and inadmissible to vary or differently apply it. The evidence was rightly rejected."

III. Another familiar rule which it is proper to notice is that the circumstances under which a contract is made may be developed for the "purpose of arriving at the intention of the parties, when such intention does not clearly appear on the face of the instrument. But the intention of the parties cannot be enforced unless consistent with the language used, and the intention cannot be ascertained, except in case of latent ambiguity, by bringing forward proof of declarations or conversations which took place at the time the instrument was made, or before or after." *McClelland v. James, supra*. Several cases are cited holding that it is competent to show by parol that there was in fact no consideration, but, as no such claim is made in this case, we need not notice these authorities. Our conclusion is that parol

evidence is never admissible to alter, vary or contradict the written contract; yet that it is admissible to show what the consideration was, unless the consideration is expressed in the instrument in such unmistakable language that parol evidence is not necessary to understand it. Taken separately, the several instruments under notice express unmistakably the consideration upon and the purpose for which they were executed; but taken together, as parts of the same transaction, not so. Taken together, without explanation, and we have Mr. Snyder conveying his real estate by absolute deeds, and taking back title-bonds, and joining in a lease to himself and brother of the same property. Such transactions never occur without some peculiar circumstances to call them forth. Looking, as we may, to the circumstances under which the parties acted, and learning, as we have, of the indebtedness to plaintiff, and plaintiff's desire to secure the same, we begin to understand why this combination of instruments; but even yet it is not clear what the considerations were for the different instruments. Taking the instruments separately, and as independent of each other, the considerations are expressed in each in unmistakable language; but taken together, as parts of one transaction, it is otherwise. Taken as one transaction, it is clear that the plaintiff did not pay the considerations named in the deeds that it might simply resell the property to the Snyders on the terms named in the bonds, while the making of the lease is wholly unaccounted for, as, by the bonds, Snyders became the conditional owners, and entitled to the possession of the property. Taken together, as they must be, it is evident that the considerations named in them are not the true considerations, and therefore the case comes within the rule that permits parol proofs as to the true consideration.

Each party alleged and introduced testimony tending to show parol agreements made at the time of the execution of the instruments, to the effect claimed by them. It will be a sufficient answer to appellants' objection to the testimony introduced by appellee, that they

joined issue and introduced evidence with respect to parol agreements.

IV. As to the consideration upon which the lease was executed, there is a direct conflict of testimony. Mr. Schuler, cashier, and Mr. Wolf, vice-president of the plaintiff bank, who alone negotiated for the bank, testified directly to an agreement that the payments on the lease were to be applied to the indebtedness other than the twenty-seven hundred dollars evidenced by the two notes then executed. Mr. J. M. Snyder, who alone conducted the negotiations on behalf of Snyder Bros. and himself, testifies as positively that the payments on the lease were to go in satisfaction of the two-thousand-dollar notes executed at that time. The negotiations were not witnessed by any other person. Schuler and Wolf are corroborated by the fact that a much larger indebtedness than twenty-seven hundred dollars was due, or about to become due, to the bank, and by their desire and J. M. Snyder's willingness to secure the indebtedness. The value of the real estate was not more than sufficient security for the twenty-seven hundred dollars and five years' interest. Snyder's refusal to give a chattel mortgage is another corroboration of their testimony. Mr. Snyder is corroborated by the fact that in plaintiff's original petition and answer to defendant's cross-bill, and in the claim filed with the assignee, all verified by Schuler, the lease was treated as such, and no recovery asked for rent; and by the further fact that the Snyders were charged with rent upon the books of the bank. These circumstances, however, are explained by the nature of the instrument upon which the original petition, answer and claim were predicated.

The decided weight of the testimony is in favor of the conclusion that the consideration for the deeds and title-bonds was the extension of time to the Snyders on twenty-seven hundred dollars of the indebtedness, for the purpose of securing the same, and that the consideration for the instrument called a "lease," and the

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giving thereby of a lien upon the personal property, was the extension of time on the remaining indebtedness, and the promise to make further advances of money, and as a security therefor; but that the security was put in this form because of Snyder's refusal to give a chattel mortgage on account of the fact that it would have destroyed their credit. The deeds and title-bonds had the effect of a chattel mortgage, and left the Snyders entitled to the possession of the property; hence that could not have been an inducement to the execution of the lease. It is a notorious fact that the giving of a mortgage by a merchant on his stock of goods is the end to credit, and generally to business. The lease, creating a lien, as it did, had the same effect upon the property that a mortgage would have had; yet it would not be so likely to disturb the credit of Snyders as the giving of a mortgage.

Among the several complaints urged by the appellants against the decree is the one that it exacts full payment without securing to the assignee of Snyder Bros. the unexpired term of the lease. There is nothing in the decree to deprive them of the full term, if payments are made according to the agreement. We have examined the decree as to all the objections urged thereto, and are of the opinion that it should be affirmed in all respects.

AFFIRMED.

PIERCE V. EARLY.

1. **Appeal: DEFENSE NOT RAISED BELOW.** An appellant cannot for the first time in this court insist upon a defense which should have been pleaded affirmatively in the court below.
2. **Former Adjudication: WHEN PARTIES NOT BOUND.** Where certain parties to a cause have at the time no interest in a portion of the decree rendered therein, they are not in a subsequent action bound by such portion, even though they do not appeal therefrom; for they have no occasion to appeal.

Appeal from Sac District Court. — HON. J. H. MACOMBER, Judge.

79	199
86	330
79	199
100	708

FILED, JANUARY 30, 1890.

APPEAL by D. Carr Early from a judgment rendered against him, and in favor of A. B. Bruner and C. M. Wickersham. The material facts involved in the case are stated in the opinion.

Breen & Duffie, James H. Tait and Cummins & Wright, for appellant.

Mason & Thomas, for appellees.

ROBINSON, J.—In March, 1881, the defendant David Herrold made to plaintiff Daniel Pierce his promissory note for two thousand dollars, and to secure its payment executed a mortgage on four hundred acres of land in Sac county. His interest in three hundred and twenty acres of the land was derived by warranty deed from defendant Early. Herrold executed to defendant James F. Wickersham a warranty deed for the mortgaged premises. In March, 1883, Wickersham executed to defendant A. B. Bruner a warranty deed for one hundred and sixty acres of the land which had been deeded by Early. The title of Early was acquired by tax deed, and was held to be defective in *Barke v. Early*, 72 Iowa, 274, and was set aside upon condition that the taxes paid by Early, and interest thereon, be refunded to him. In January, 1887, Pierce filed his petition in the court below, making the persons hereinafter named, and other, parties defendants, demanding judgment for the amount due on the Herrold note, and asking the foreclosure of the mortgage. The petition alleged the failure of the Early title; that the consideration paid Early by Herrold was one thousand and sixty dollars, and asked for judgment against Early for that amount, with interest thereon from March 21, 1881, in case the amount found to be due Early by virtue of the decree in the *Barke case* was paid; and that the amount so paid, if any, be applied, so far as necessary, in paying the amount

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due on the note in suit. On the twenty-eighth day of September, 1887, Herrold, J. F. Wickersham and Bruner were adjudged in default for want of appearance and answer, and a decree was rendered in favor of Pierce for \$2,555.60, and attorney's fee and costs, and foreclosing the mortgage absolutely as to the eighty-acre tract not derived from Early, and ordering the sale of all the premises mortgaged, if the taxes paid by Early were not refunded, as provided in the *Barke* decree; but providing that, in case the amount due Early should be paid into court, then that the clerk of the court should pay it to Pierce. From so much of that decree as ordered the amount paid into court, on account of the taxes paid by Early, to be applied in payment of the amount due Pierce, Early served a notice of appeal on the nineteenth day of December, 1887. On the second day of December, 1887, the parties in interest appeared in court, and a supplemental decree was rendered. That recited the conveyance from Early; the failure of his title; that the amount due from Early on his covenants of title was fourteen hundred and seventy-four dollars; that there was a difference of opinion among the parties to the suit as to who was entitled to that amount; and that Early claimed that he was entitled to credit thereon for the amount of taxes he had paid. It ordered that Early pay into court the said amount of fourteen hundred and seventy-four dollars, and that it be held subject to the further order of the court. On the fifth day of December, 1887, defendants Bruner and C. M. Wickersham filed a petition, alleging that J. F. Wickersham had assigned to said C. M. Wickersham his claim and right of action on the covenants in the Early deed; that C. M. Wickersham was entitled to three-fifths and Bruner to two-fifths of the fourteen hundred and seventy-four dollars due from Early; and alleging that the amount due Pierce had been fully paid. Judgment was demanded in favor of petitioners for the said amount, in the proportions named. Early filed an answer. A trial was had, and a decree rendered finding that Early

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was entitled to a credit on the amount due on his covenants of warranty, for the sum of \$864.82, and that it had been paid into court, and applied in payment of the Pierce mortgage. The decree provided for the recovery by Bruner and C. M. Wickersham of the remainder of the fourteen hundred and seventy-four dollars, after allowing the credit aforesaid. From that decree the parties last named appealed, and the decree was reversed by this court in *Pierce v. Herrold*, 75 Iowa, 505. At the November term, 1888, of the court below, Pierce and Early appeared. C. M. Wickersham and Bruner filed a motion for a decree in harmony with the opinion of this court, but we find no ruling thereon. Pierce filed an answer, which alleged, among other matters, that the decree rendered in his favor had been satisfied; that the \$864.82 paid into court on account of the taxes due Early had been used in making such satisfaction; that Early had appealed from so much of the decree as had provided for payment of the money due him on the decree; that the appeal had not been determined; and that, in case it was decided in favor of Early, Pierce would have to refund the amount to the clerk. He therefore asked that no order be made until such appeal should be determined, and that, if an order is made, it should require the money owing by Early to be kept in court pending the determination of his appeal. Early filed an amendment to his former answer, the contents of which we need not set out, and asked for a delay in disposing of the money due from him until his appeal should be determined. Replies to the answers of Pierce and Early were filed, and, the cause having been submitted, a decree was rendered against Early in favor of Bruner for \$629.42, and in favor of C. M. Wickersham for \$944.13.

I. Appellant contends that Bruner and Wickersham have failed to show themselves entitled to judgment against him for any sum, for that it is not shown that he was not released from his covenants previous to the execution of the deed from Herrold to J. F. Wickersham, and it is not

1. APPEAL: defense not raised below.

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shown that Herrold had not paid to appellees the damages they sustained by the failure of his title. The decree of December 3, 1887, determined that Early was liable on the covenants of his deed, fixed the amount of his liability, and required him to pay that amount into court for future disposition. No appeal having been taken from that decree, it is final. Early's liability to some one on his covenants of warranty does not seem to have been questioned in the court below. If he had been released by payment made by his grantees or otherwise, that fact, under the circumstances of this case, should have been pleaded affirmatively as a defense. The evidence shows that, unless there has been a discharge of appellant's liability, appellees are entitled to recover of him something by reason of the covenants of his deed, and of others in their chain of title. We are satisfied that the question now presented by counsel is raised for the first time in this court, and that it is without substantial merit.

II. The evidence shows that the sum of \$864.82 was paid into the court below as money to which Early was entitled by reason of taxes paid by himself and others, and that it was paid to Pierce on account of the decree in his favor.

2. FORMER adjudication: when parties not bound.

It is insisted with much earnestness by counsel for appellant that an order to which appellees were parties having been made for the use of the money in the way in which it was applied, and appellees not having appealed from that order, and money of Early having been used as directed by the order, Early should be credited with the amount so used; that his liability on the covenants of his deed amounted to but \$1,573.55 when the decree in the court below was rendered, but, notwithstanding that fact, the effect of the two decrees is to compel him to pay \$2,438.37. It was decided in *Pierce v. Herrold*, 75 Iowa, 505, that Early was not entitled to have the amount due him for taxes paid, deducted from the sum due appellees. While it is true that appellees were parties to the decree of September

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28, 1887, it is also true that, under the decision last cited, they had no interest in the amount due Early, and as to that they were not affected by the decree, and had no occasion to take an appeal. In fact, counsel for appellant argue with much ability that Early should not have made them parties to his appeal, for the reason that they had no interest in any matter involved in it. If that be true, it follows that they lost no rights by not appealing. The decree in question did not purport to dispose of money due from Early on his covenants, upon which appellees rely. If it was erroneous, Early was entitled to have it corrected by pursuing the remedy provided by law, and he, and not appellees, should suffer if for any reason the error is not corrected.

III. Other questions discussed by counsel are disposed of by what we have already said, or are not of sufficient importance to be separately mentioned. It is sufficient to say that we are satisfied that the decree of the district court is in harmony with the law and the facts of the case. It is therefore

AFFIRMED.

BYERLY V. THE CITY OF ANAMOSA.

1. **Defective Street: NEGLIGENCE IN DRIVING ON: QUESTION FOR JURY.** It is not *per se* negligence for a person to drive upon a street which he knows to be defective; but the question of negligence in such a case is one for the jury, to be determined from all the circumstances. (See opinion for citations.)
2. **——: LIABILITY OF CITY: ACCEPTANCE OF STREET BY ORDINANCE.** Where a city by ordinance has required a street to be improved and sidewalks to be constructed thereon, and it has been used for a great many years as one of the principal thoroughfares of the city, the city is liable for an injury resulting from its negligence in caring for it, though it has never accepted the street by special ordinance. Section 527 of the Code, providing for the acceptance of streets by special ordinance, does not apply. (*Laughlin v. City of Washington*, 63 Iowa, 652, distinguished.)

79	204
90	85
79	204
108	446
79	204
104	113
79	204
116	193
79	204
124	524
79	204
1125	631
79	204
1144	546

Byerly v. City of Anamosa.

8. ———: INJURY TO FRIGHTENED HORSE: PROXIMATE CAUSE. Where a horse driven by his owner on a city street became frightened and ran away, and went over an embankment which it was the duty of the city to protect by a railing, whereby it was killed, *held* that the negligence of the city in not providing the railing was the proximate cause of the injury, and that the city was liable. (See opinion for cases followed and distinguished.)
4. ———: LIABILITY OF CITY: ACCIDENT NOT FORESEEN. It is the duty of a city to take such care of its streets as is reasonably necessary for the security of travelers, and where it fails so to do, and in consequence an injury occurs, it cannot escape liability on the ground that an accident and injury of that particular kind could not be foreseen.

Appeal from Jones District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, JANUARY 31, 1890.

ACTION to recover for injuries to plaintiff's horse and buggy, caused by the dangerous condition of a street in the defendant city upon which he was driving his horse and buggy. There was a judgment and verdict for plaintiff. Defendant appeals.

Ezra Keeler, for appellant.

J. W. Jamison and *M. W. Herrick*, for appellee.

BECK, J.—I. The plaintiff was driving on Main street, in the city of Anamosa, and desired to go from Davis to Williams street, which at this place is occupied by the track of the Chicago and Northwestern Railway. There was an engine standing on the street when plaintiff attempted to pass over this part of it, which, before he had reached Williams street, began moving. Main street, in this locality, had been filled five or six feet higher than the adjacent lots. There were no barriers or railings to prevent horses from going over the bank. Plaintiff's horse, which he was driving, became frightened at the moving engine, ran over the bank and was killed. The buggy and harness

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were injured. The action is brought to recover for injuries to plaintiff's horse and buggy, caused by defendant's negligence in failing to erect and maintain barriers or railings along the street.

II. Counsel for the defendant now insist that the court below erred in not granting a new trial on the ground that the evidence is insufficient to

1. DEFECTIVE
street : negli-
gence in driv-
ing on : ques-
tion for jury.

support the verdict. The objection is based on the claim that the evidence shows contributory negligence on the part of plaintiff, for the reason that he knew the place was dangerous, and he saw the engine ready to move, before going upon this part of the street. But going upon the street with the knowledge of the existence of conditions rendering it dangerous is not *per se* evidence requiring the conclusion that plaintiff contributed to the injury. *Ross v. City of Davenport*, 66 Iowa, 548; *Walker v. Decatur County*, 67 Iowa, 307; *Munger v. City of Marshalltown*, 59 Iowa, 763; *Rice v. City of Des Moines*, 40 Iowa, 638; *Hanlon v. City of Keokuk*, 7 Iowa, 488. The contributory negligence on the part of plaintiff was a question for the jury. It cannot be said that their finding on this branch of the case is so without the support of the evidence that it ought to be set aside.

III. No dedication of the part of the street where the accident in question occurred had, as we understand

2. —: liability
of city :
acceptance
of street by
ordinance.

the case, ever been accepted by any ordinance of the city council. Indeed, there appears never to have been a formal dedication thereof by the land-owners, other than opening the street for public travel, doing work upon it to fit it for such use, and the like. It appears that an old military road, existing, as we understand the abstract, before the town was platted, was at this point changed from the old line so as to occupy the locality where the accident occurred. It has been so occupied for a great many years. The filling and macadamizing were almost wholly done by the property-owners and the railway company. Little if any of the

Byerly v. City of Anamosa.

work was done by the city. But the city, by ordinance, required the adjacent land-owners to build sidewalks along the street at the locality in question. From the time of the occupation of the locality by the street it has been a part of a thoroughfare of the city, and traveled and used as all other streets of the city. Counsel for defendant insist that, as the city has not accepted the street in question by an ordinance duly passed, it cannot be regarded as a street which the city is under obligation to keep in repair. He bases this position upon a provision of the statute found in Code, section 527, in the following language: "No street or alley which shall hereafter be dedicated to public use by the proprietor of the ground in any city shall be deemed a public street or alley, or to be under the use or control of the city council, unless the dedication shall be accepted and confirmed by an ordinance especially passed for such purpose." It is not, and cannot be, claimed that a dedication by opening the street, and preparing it for the use of the public as above shown, is not sufficient, if accepted by the city, to make the street a public highway, and bind the city to keep it in repair as other streets. We are to determine whether the omission to accept the street by ordinance relieves the city of all liability for neglect to keep it in a safe condition. The statute in question is clearly intended to protect cities from liability and responsibility thrown upon them by land-owners in dedicating streets to public use without giving the city an opportunity to determine whether such streets are demanded by the public good and the wants of the citizens. In the absence of the statute, the city would be helpless to resist the designs of land-owners to make it liable for all streets they might dedicate, without regard to the public good or the wants of the people. But the statute does not forbid the city to assume control of, and use for the public, streets not dedicated, as in the case of purchase by the city, or to assume the use and control of streets dedicated by land-owners, without

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the enactment of ordinances accepting the dedication. But it simply provides that, when dedication is made, upon the acceptance of such dedication the street shall be assumed to be a public way, under the use and control of the city. See *Wisby v. Bonte*, 19 Ohio St. 238; *City of Waterloo v. Mill Co.*, 72 Iowa, 438. The facts of this case distinguish it from *Laughlin v. City of Washington*, 63 Iowa, 652. In this case the city, by ordinance, had required the street to be improved, and sidewalks to be constructed. The street, at the particular locality in question, was for a great many years used as one of the principal thoroughfares in the city. In the other case there was no recognition of the existence, but only some uncompleted action of the city, begun with a view of determining whether the dedication of the street should be accepted. The use by the public of the street was inconsiderable, and for the brief space of two or three weeks only. The court below, in the admission of evidence and in rulings on instructions, held in accord with these views. Evidence was admitted tending to show the action of the city in recognizing the street by ordinance, and the exercising of control thereof, repairs made thereon, and long and very general use of the street as a public thoroughfare. The instructions hold that these things, if found by the jury, would charge the city with liability for neglect in keeping the street in a safe condition. These instructions, as well as the rulings on the admission of evidence referred to, are correct.

IV. Counsel for defendant insist that the court erred in an instruction in which the defendant is held liable for injuries resulting from plaintiff's horse becoming unmanageable from fright, and in that condition running over the bank.

3. —: injury to frightened horse: proximate cause.

Moss v. City of Burlington, 60 Iowa, 438, is cited in support of this position. This case holds that when a horse, which the owner left tied to a post, became frightened, broke loose and ran down a bank, and was killed, the plaintiff could not recover. In that case

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the horse was not being driven by the owner, so that, if it were possible, he could have controlled it, and directed its course. He had left it tied to a post. The city was not liable for the insufficient fastening of the horse, or for its escape, through fright, from sufficient fastenings. The plaintiff's injury was caused by the escape of the horse. After it escaped it was free to go anywhere. In the case before us, plaintiff was attempting to exercise control of his horse. Had there been no defect in the street, the accident would not have happened; for there would have been no bank over which the horse could have run. It was simply the case of a runaway horse, and of injury resulting from defect or impediment in the street; and in this respect it is not different from *Manderschid v. City of Dubuque*, 25 Iowa, 108; *Fowler v. Town of Strawberry Hill*, 74 Iowa, 644; *Martin v. Town of Algona*, 40 Iowa, 390. See, especially, as applicable to the questions of defendant's liability, *Manderschid v. City of Dubuque*, *supra*, and cases therein cited.

V. The seventh instruction given to the jury is to the effect that the defendant was not absolutely required to maintain a railing upon the street in question. The duty to do so only arose in case it was reasonably necessary for the security of travelers, and a railing would have prevented the accident. Counsel for defendant insist that the instruction is erroneous, for the reason that it is not limited so that defendant would not have been liable for unforeseen accidents, and accidents arising from unmanageable horses. It is sufficient to say that it is impossible for either plaintiff or defendant to foresee all accidents which would arise in ordinary cases from defects in the highway. The combination of occurrences producing danger and injury cannot be foreseen by human intelligence. Indeed, accidents are usually unforeseen. But the fact could have been seen in this case that, by reason of the absence of a railing, the vehicle of the traveler on the street was exposed to

4. —: liability
of city: acci-
dent not
foreseen.

McLeary v. Doran.

danger, upon the occurrence of almost infinite combinations of circumstances, of being driven or thrown over the bank. We have seen that the plaintiff is entitled to recover for injuries arising from the unmanageable horse. These considerations dispose of all questions in the case. The judgment of the district court is

AFFIRMED.

79	210
85	295

79	210
111	172

79	210
112	282

MCLEARY *et al.* v. DORAN *et al.*

1. **Estates of Decedents: CLAIM FILED TOO LATE: JURISDICTION.** The fact that a claim against an estate is filed more than a year after the publication of notice of administration does not affect the jurisdiction of the court to allow or reject it.
2. ———: **PROOF OF CLAIMS: NOTICE WAIVED BY APPEARANCE.** The allowance of a claim against an administrator cannot be assailed on the ground that he was not notified of the hearing, where it appears from the record that he was present and had an exception entered to the order, and his subsequent report shows that he employed counsel and resisted the claim.
3. ———: **ALLOWANCE OF CLAIM: HOW FAR BINDING UPON HEIRS.** Where a claim has been adjudicated against an administrator, it is so far binding upon the heirs that they cannot have the allowance set aside, as against the claimant, by exceptions to the administrator's report. If the administrator has been guilty of maladministration in allowing a claim, or colluding with a claimant, the heirs may have recourse against him and his sureties. (*Dessaint v. Foster*, 72 Iowa, 639, distinguished.)

Appeal from Polk District Court.—Hon. MARCUS KAVANAGH, JR., Judge.

FILED, JANUARY 31, 1890.

THIS is a proceeding in probate by which the plaintiffs, who are the heirs-at-law of Samuel Hedges, deceased, demanded the cancellation and setting aside of an order of the court by which a claim of the defendant John M. Day was allowed and established against the estate. The defendant Simon Doran is administrator of the estate of said Hedges, and the

McLeary v. Doran.

question as to the validity of the order was presented in the form of exceptions to the report of the administrator. The relief demanded was denied, and the heirs appeal.

E. J. Goode and J. H. Phillips, for appellants.

Baylies & Baylies, for John M. Day.

ROTHROCK, C. J.—I. Simon Doran was appointed administrator of the estate in September, 1885. Notice of administration was given on the fourteenth day of that month. The claim of Day against the estate was filed on the eighth day of October, 1886. It was founded on a promissory note. In the statement of the claim no reference was made to the fact that it was not filed within twelve months of the giving of notice of administration, as required by section 2421 of the Code. On the ninth day of November, 1886, the administrator made a report to the court, in which it appears that the estate was then fully settled, except the claim of Day; and reference was made to the fact that the claim was not filed within the year for filing claims, and that he had not allowed the same. On the twenty-eighth day of September, 1887, he filed another report, in which he referred to the claim of Day as follows: "I further report that the John M. Day claim remains in the same condition as at my last report." On the fifteenth day of December, 1887, the following proceedings were had in said court:

"No. 1559. Probate. Estate of Samuel Hedges, deceased. Proceedings on claim of John M. Day. Filed, October 8, 1886. John M. Day filed petition claiming from Simon Doran, administrator of above estate, \$535.80, including interest on a certain promissory note, executed October 29, 1878, for three hundred dollars, by A. J. Kent and Samuel Hedges, which note is due, wholly unpaid, and his property, and asks that same be established and allowed as a claim against said estate. Duly verified by John M. Day. Order allowing claim: Now, on this day, this cause coming on

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for hearing upon the petition of John M. Day for the allowance of a claim against said estate, filed after the expiration of the year allowed for the filing of claims against the estate, and the plaintiff being present in person and by attorney, and the court, having heard the evidence offered by the parties, finds that there are good and sufficient equitable grounds shown by the plaintiff why said claim was not proved within one year from the appointment of said administrator, and that said claim is not barred by the statute of limitations, but is a valid and subsisting claim against said estate, to the amount thereof, with interest; said liability being as surety upon the note sued on. It is, therefore, ordered and adjudged that the plaintiff John M. Day have and recover of Simon Doran, as administrator of the estate of Samuel Hedges, the sum of \$573.30, with interest from this date at ten per cent. per annum, and also the costs of this suit; and it is ordered that the same be paid by said administrator out of the assets of said estate,—to all of which the administrator excepts.

“MARCUS KAVANAGH, JR., Judge.”

On the twentieth day of March, 1888, the administrator filed the following supplemental report :

“Samuel Hedges' Estate. Comes now the administrator, Simon Doran, and amends his report filed September 28, 1887, by showing * * * that in this suits have been tried, and since said report was filed the John M. Day claim has been allowed, thus making an additional claim of \$573.30, with interest at ten per cent. since December 15, 1887. I was obliged to attend said trial with counsel, and I ask as compensation the \$21.77, being balance of two and one-half per cent. in full, as claimed in report filed November 9, 1886, and I ask an order for payment of the Day claim, as well as balance due myself, and ask that, upon filing vouchers showing payment of same, that I be discharged.

“SIMON DORAN.”

The present proceedings were commenced on the twenty-sixth day of March, 1888, and the papers filed by the plaintiffs attack the report, and except thereto,

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on the ground that the claim of said Day was invalid and void; not filed nor proved within the proper time; that the estate had before that been settled up, and proceeds distributed to the heirs; and that the court was without jurisdiction to try and determine the validity of said claim. The administrator did not file any written resistance to said claim. This was not necessary. It was his right to resist its allowance without any pleading on behalf of the estate (Code, sec. 2410); and the order allowing the claim shows that the failure to file within one year was called to the attention of the court, and it was held that said claim was not barred by the statute of limitations.

II. It is claimed in behalf of appellants that the order allowing the claim is void on the face of the record, because the claim was filed after the expiration of one year from the giving of notice of administration, and it contained no averment of any equitable circumstances which would excuse the failure to file and prove the same within the year. This may be a good reason for compelling the claimant to amend the statement of his claim, but the defect did not, in our opinion, affect the jurisdiction of the court. The claim was not demurrable upon its face because it did not appear therefrom that it was not filed within the proper time. Even if it had so appeared, and a demurrer could have been interposed, that would not affect the jurisdiction of the court.

III. It is further urged that the order was void because no notice was given to the administrator of the hearing of the application for the allowance. The record shows that the administrator was present at the hearing, and that he had an exception entered to the order; and the report which he subsequently made shows that he was present and employed counsel, and resisted the claim. The object of the notice is to enable the administrator to be present at the hearing, and interpose proper defenses to the claim, and it has uniformly been held that where a defendant appears to an action he cannot be allowed to

1. ESTATES of
decedents:
claim filed too
late: juris-
diction.

2. —: proof of
claims: notice
waived by
appearance.

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claim that he was not served with notice; and we see no reason why the same rule should not apply to administrators as well as other parties.

IV. It appearing upon the face of the record that the court had jurisdiction to try and determine the validity of the claim in controversy, the question for determination is, have the heirs of the decedent any right to question the adjudication by exceptions to the report of the administrator? It is provided by section 2474 of the Code that mistakes in settlement may be corrected after final settlement, on showing such grounds of relief in equity as will justify the interference of the court. This statute was evidently intended as a protection to heirs against the mistakes or fraudulent acts of administrators. No authority is found therein for a proceeding to vacate an order of the court allowing a claim upon a hearing, unless it be made to appear that there was fraud or collusion between the administrator and the claimant; and we do not think the plaintiffs are entitled to the relief provided for by section 2475 of the Code, because they do not make any attack upon a settlement of the accounts of the administrator in their absence, and within three months. They demand that an order made by the court upon a final hearing shall be vacated and set aside. The law provides that claims against an estate shall be entitled in the name of the claimant and against the executor, that a trial by jury may be allowed, and that all proceedings of law applicable to an ordinary proceeding shall apply. Code, secs. 2409, 2411. No other person is required to be made a party to the proceeding. Now, what is sought by the plaintiffs is not an order requiring the administrator to strike the allowance of Day from the settlement, and account to the estate the same as though no order had been made; but they propose to readjudicate the claim as to the defendant Day. It is apparent that, if this may be done, the hearing provided by statute is a mere preliminary examination, subject to be impeached and tried over again at the instance of the heirs, and the settlement of

3. —: allow-
ance of claim:
how far bind-
ing upon
heirs.

estates would thus be attended with serious embarrassments. The administrator and the claimant are the proper parties to the proceeding, and if the administrator is guilty of maladministration in allowing a claim, or colluding with a claimant, the heirs have recourse against him and his sureties. But no such charge is made against the defendant Doran. If the decision of the court in allowing the claim was erroneous, the error could have been corrected on appeal; and we know of no other way to attack it, unless it be by a proceeding based upon fraud.

We do not think that the case of *Dessaint v. Foster*, 72 Iowa, 639, cited by counsel for appellant, is in conflict with the views herein expressed. In that case an administrator sought to set aside the allowance of a claim against an estate, made in his absence, on the ground that the claimant had no valid claim against the estate. It was held that the order of allowance might be set aside in a proper case. But in the case at bar the administrator was not absent when the order was made. He was present, and a full hearing was had, and, so far at least as the rights of the claimant are involved, it must be regarded as an adjudication.

This disposition of the case renders it unnecessary to determine other questions argued by counsel.

AFFIRMED.

THE CITY BANK OF BOONE V. RATKEY.

1. **Chattel Mortgages: DESCRIPTION OF PROPERTY.** The rule is well established that if, from the description contained in a chattel mortgage, the mind is directed to evidence whereby it may ascertain the precise thing conveyed, the record of the instrument is notice to third persons; otherwise it is not. (See *Everett v. Brown*, 64 Iowa, 442.) Under this rule, *held* that the following description was sufficient: "The following described cattle now kept by us on our farms" in a certain township (giving the names of the cattle): "Eighteen head of two-year-old steers, of various colors. The foregoing represents the names of said cattle as registered in the American Short-Horn Herd Book. Also one span of heavy, dark bay mules, also kept on said premises."

79	215
89	46
79	215
87	369
79	215
92	208
92	591
79	215
131	229

City Bk. of Boone v. Ratkey.

2. ——— : IDENTITY OF PROPERTY : EVIDENCE. Where there is some evidence as to the identity of mortgaged chattels, this court will not disturb the finding of the jury on that point.
3. ——— : NOTICE : PROOF OF RECORDING. In an action to recover property by virtue of a chattel mortgage, it is necessary for the plaintiff to prove actual notice of the mortgage, or constructive notice by the recording thereof. In the absence of any evidence tending to prove such notice, it was error to submit the question to the jury, and a verdict for plaintiff should have been set aside.

Appeal from Boone District Court.—HON. JOHN L. STEVENS, Judge.

FILED, JANUARY 31, 1890.

ACTION to recover possession of thirty-seven head of steers, claimed by virtue of a chattel mortgage from L. M. Fisk & Son to plaintiff. Defendant answered, denying each and every allegation in the petition. Trial to a jury. Verdict and judgment for plaintiff. Defendant appeals, assigning as errors that the court erred in admitting evidence, in giving the third instruction to the jury, in overruling appellant's motion for a new trial, and in rendering judgment for the plaintiff.

Clayton Harrington, Crooks & Jordan and S. R. Dyer, for appellant.

E. L. Green, for appellee.

GIVEN, J.—I. Appellant's contention is that the description of the property in the mortgage under which appellee claims is not such as the law requires in order to impart notice to third persons by the record thereof. The rule is well established that if, from the description contained in the mortgage, the mind is directed to evidence whereby it may ascertain the precise thing conveyed, if thereby absolute certainty may be attained, the instrument is valid; otherwise it is void, as to third persons, for uncertainty. *Everett v. Brown*, 64 Iowa,

1. CHATTEL
mortgages:
description
of property.

422, and cases therein cited. This mortgage recites that L. W. Fisk & Son, in consideration of two thousand dollars in hand paid by the said bank of Boone, have bargained and sold, and by these presents do grant and convey, unto said party, the following goods and chattels, to-wit: "The following described cattle, now kept by us on our farms in Peoples township, Boone county, Iowa, viz.: Sarah, Lena, May Queen, Amy, Puss, Clara, Bertha, Ida Oxford 3rd, Ben Scott, Pansy Peoples 3rd, Sharon Duke, Oxford Lad, Belinda Peri 2nd, Rose Mary Peoples 3rd, Mary W. Peoples, Jupiter Peoples, Amelia Peoples, Cypress Hooker, Lillian Duke; eighteen head of two-year-old steers, of various colors. The foregoing represents the names of said cattle, as registered in the American Short-Horn Herd Book. Also, one span of heavy, dark bay mules also kept on said premises." Following this is a covenant to warrant and defend, and the usual conditions in such mortgages. We have examined all the cases wherein this court has held the description insufficient, as well as those wherein it has been held that it was sufficient, and are clearly of the opinion that the description in this mortgage is such as to bring it within the rule stated above, and to put third persons on inquiry that would have discovered the precise property mortgaged.

II. Appellant's next contention is that the testimony falls far short of identifying the cattle taken under the writ as being the same described
 2. —: Identity of property: evidence. in the mortgage. The cattle were taken from the immediate possession of C. Harrington, who was holding them on behalf of defendant, and who had just taken them from the farm of Fisk & Son. He states: "I took all the steers that I found on the farm. I do not know whether those I found were all that were on the farm or not." This, with the testimony of J. M. Fisk and others, as to the ages of the cattle taken, was surely testimony enough upon which to submit the question to the jury, and which

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was done by the court. We see no reason for disturbing the finding of the jury that the cattle were the same.

III. The court instructed the jury that to entitle the plaintiff to recover they must find, among other things, that the mortgage to the plaintiff
 8. —: notice: proof of re-
 cording. had been duly recorded prior to the time the defendant took possession of the cattle.

Appellant contends that there is no evidence that the plaintiff's mortgage was ever recorded. The plaintiff alleges in the petition that it was duly recorded in the office of the recorder of mortgages for Boone county, Iowa, on February 25, 1885, in Book 2 of Personal Property Record, on page 9. This is controverted by the defendant's general denial; and thereby the burden was cast upon the plaintiff to prove that the mortgage had been recorded, before being entitled to any advantages that would result from the recording of the same. Appellant's abstract shows that plaintiff offered in evidence the mortgage (Exhibit A) and the note (Exhibit B); to which the defendant objected on the grounds "that the mortgage is void for uncertainty in the description of the property sought to be conveyed by it; that a record of it does not impart constructive notice to third parties," etc.,—which objection was overruled. The mortgage set out as "Exhibit A" in appellant's abstract does not embrace any indorsement showing that the same had been recorded. Appellee's amendment to appellant's abstract states that "plaintiff here offered in evidence its mortgage, marked 'Exhibit A,' and also its note, marked 'Exhibit B,' copies of which are set out in appellant's abstract. Upon the back of which mortgage, so offered in evidence, was indorsed the certificate of county recorder for Boone county, Iowa: 'Filed in the office of the recorder of deeds for Boone county, Iowa, on the — day of February, 1885, at — o'clock, and recorded,' " etc. "Note: The plaintiff did not formally offer in evidence the certificate of the county recorder as to when said

chattel mortgage was filed for record, but simply offered the mortgage itself, believing such offer carried with it all indorsements connected with it, and appearing upon the writings." The transcript shows that the plaintiff offered in evidence mortgage, Exhibit A, and note, Exhibit B, to which defendant objected, as stated in her abstract. The transcript embraces a copy of the plaintiff's mortgage offered in evidence, with the certificate. The mortgage marked "Exhibit A" is indorsed in words and figures as follows, to-wit: (See the indorsement upon each exhibit, being a sheet, printed blank filled, last preceding, which indorsements are copies of the indorsements upon said exhibit). The printed blank filled last preceding bears no indorsement whatever showing the recording of the original. Appellant seems to rely upon the claim that, to charge her with notice, appellee must prove that the mortgage has been indexed, while appellee seems to rely upon the claims that the introduction of the mortgage carried with it the indorsement thereon, and that thereby the fact of recording was proven. It is not clear to us why a matter that was so easily established either way should be left in any doubt. If the mortgage ever was recorded, the record in this case fails to show it, but, on the contrary, shows that it never was. The plaintiff must recover possession, if at all, upon the strength of his own right to possession, and not because of the weakness of the right of his adversary. This plaintiff is asking to recover possession from the third person by virtue of this chattel mortgage alone. To render this mortgage valid and binding as to defendant it must appear that she had either actual or constructive notice thereof. There is no allegation or proof of actual notice; and, the mortgage not having been recorded, there is no evidence of constructive notice to the defendant prior to the time that she, through her agent, took possession of the cattle.

The mortgage not having been recorded, the court erred in submitting that question to the jury, and in

Rappleye v. The Racine Seeder Co.

overruling appellant's motion for new trial on the ground that the verdict is not sustained by sufficient evidence. As for these reasons the case must be reversed, it is unnecessary to notice the other points made on the appeal, as they will not arise on retrial. The judgment of the district court is

REVERSED.

79	220
82	735

RAPPLEYE V. THE RACINE SEEDER COMPANY.

1. **Assignment for Benefit of Creditors: EFFECT UPON UNEXECUTED CONTRACT WITH MUTUAL OBLIGATIONS.** Defendant entered into a contract with Y. Bros. to sell them a certain number of machines, for which payment was to be made by the promissory notes of Y. Bros. as the machines were delivered; and in consideration thereof Y. Bros. were to have the exclusive sale of the machines in certain territory, and they were to canvass the territory for the sale of the machines, and to take cash or notes of the purchasers in payment, and to turn the cash and notes so taken over to defendant,—the cash to be indorsed as payment on the notes of Y. Bros., and the notes to be held as collateral security. After some of the machines had been sold by Y. Bros. and delivered to the purchasers under the contract, Y. Bros. became insolvent, and made an assignment for the benefit of their creditors, and defendant notified the assignee that it would regard the contract as ended, and would furnish no more machines thereunder, and afterwards it entered the same territory and sold the machines therein. This action is by the assignee to recover for a breach of the contract. *Held—*

- (1) That sections 2082 to 2087 of the Code, making all contracts assignable, refer only to the rights, in possession or action, of the holder by virtue thereof, and not to his obligations thereunder; and that, therefore, Y. Bros. could not, by reason of anything contained in said sections, by an assignment, compel the defendant to accept the assignee as their debtor instead of themselves.
- (2) That when Y. Bros. became insolvent, the defendant was no longer bound to furnish them the goods contracted for on credit, but had a right to declare the contract at an end, and that they could not, by the assignment, confer any greater right upon the assignee.

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(3) It would *seem* (but it is not decided) that if the assignee had demanded the rest of the machines and offered to pay the cash for them, defendant would have been obliged to furnish them, and to comply with the contract in other respects.

2. ———: PERSONAL JUDGMENT AGAINST ASSIGNEE: WHAT IS NOT. In an action against the assignee of Y. Bros. for the benefit of their creditors, the judgment was that the claim "be and is hereby established as a claim against the estate of Y. Bros., and against the said R. as their assignee." *Held* not to be a personal judgment against R., but only an establishment of the claim.

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, JANUARY 31, 1890.

ACTION for breach of contract in the sale of certain seeders, in which the court, without the intervention of a jury, found the following facts :

"*First.* That prior to October 14, 1884, the firm of Young Bros., the plaintiff's assignors, were a copartnership engaged principally as manufacturers' agents in the sale of agricultural implements throughout the state of Iowa, having their place of business at the city of Des Moines, in said state. *Second.* That on the nineteenth day of August, 1884, the Racine Seeder Company, of Racine, Wisconsin, the defendant herein, made with said Young Bros. the contract introduced in evidence, and marked 'Exhibit A,' as alleged in plaintiff's petition. *Third.* That by said contract the defendant sold to Young Bros. nine hundred Strowbridge Broadcast sowers, for which payment was to be made by the promissory notes of Young Bros. as implements were delivered, and in consideration for such purchase the defendant granted to said firm the exclusive privilege of selling said implements in the western half of the state of Iowa. Young Bros. were to canvass said territory and solicit written orders for said Strowbridge sower, in the name of the defendant, using blank orders prescribed by it; and the orders thus taken were to be turned over to the defendant, and thereupon the

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implements were to be shipped by the defendant to the various purchasers, at the time stated in such orders. Young Bros. were further required to take promissory notes in settlement for implements thus sold, when sales were not for cash; and such notes were to be turned over to the defendant, in addition to the contracts before mentioned, as collateral security for the notes of Young Bros. If implements were sold for cash, the same was to be immediately applied by Young Bros. on the purchase price of the implements contracted for. *Fourth.* That, upon the faith of the above contract, Young Bros. proceeded to canvass the territory assigned them, taking orders for the said implements, and turning them over to defendant, and otherwise performing their part of said contract, and up to the fourteenth of October, 1884, had sold about three hundred of said implements, at prices varying from \$16.50 to \$18.75. Said contracts were identical in form with Exhibit A, hereto attached. *Fifth.* That on the fourteenth day of October, 1884, the said Young Bros. made a general assignment for the benefit of creditors to one Isaac Henshie, who continued to perform the duties of said assignee until his death, on December 8, 1884; that the record of the instrument found on pages numbers 10, 11, 12 and 13 of book number 154 of chattel mortgage records, in recorder's office of Polk county, Iowa, introduced in evidence, is a true copy of said general assignment; that by said assignment all rights under said contract of Young Bros. with defendant passed to said assignee; that the plaintiff in this cause is the successor in office to said Isaac Henshie as assignee of said Young Bros., duly appointed by the circuit court of Polk county, Iowa, on or about the thirteenth day of December, 1884. *Sixth.* That on the fifth day of November, 1884, the defendant sent to Young Bros.' recent place of business, by messenger, the letter of that date set out in defendant's answer herein, giving notice of its refusal to go on with the contract before mentioned; that the defendant

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intended by the notice given in said letter to put an end to the contract entirely, and the same was understood and treated by the assignee of Young Bros. as so intended; that soon after the service of the above notice the defendants entered this same territory which had been granted by said contract to Young Bros., made new contracts, in its own name, with some of the persons with whom Young Bros. had contracted for the sale of said implements, and sold large numbers of the same to divers other persons in said territory. *Seventh.* That as soon as practicable after entering upon his duties as assignee of said Young Bros.' estate, the said Isaac Henshie sought legal advice with reference to his rights as such assignee under said contract, and was advised that he had a right under the law to go on with the same, and require performance thereof on the part of defendant; and there was evidence tending to show that he thereupon procured an agent to further canvass the territory named in said contract, and was otherwise arranging to go on with the same, when he received said defendant's letter of November 5, 1884, giving notice of its refusal to perform said contract. Such evidence was, in substance, that said assignee called in from the road one William Gracey, who had previously been employed by Young Bros. to sell said Strowbridge sower, the goods handled by Young Bros., in said territory; that said Gracey was subsequently in the city; and that the account book kept by the assignee showed an account with William Gracey, in which appeared the following entry: 'October 20, 1884. Commenced work at sixty dollars per month and expenses;' that said Gracey received money from said assignee, and subsequently took the two orders for thirty-five of said Strowbridge sowers, which were introduced in evidence, and marked 'Exhibit B' (22 and 23), but this was no evidence that the defendant had knowledge of these matters; that at the time said letter of November 5, 1884, was received from the defendant said assignee had not had a reasonable time in which to perfect

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arrangements for going on with said contract. *Eighth.* That said Strowbridge Broadcast sower is a patented article, of which defendant was the sole manufacturer. About the month of February or March, 1885, however, a similar sower was put upon the market by the Joliet Wire Company of Joliet, Illinois, at less than this contract price; but this was considered by defendant to be an infringement on the Strowbridge patent. *Ninth.* That at no time has defendant either made or tendered to plaintiff, or to his predecessor in office, the said Isaac Henshie, or to said Young Bros., any compensation whatever for the labor or moneys expended by them, or for any portion of their performance of said contract, or made or offered in any manner to place the said persons, or either of them, *in statu quo.* *Tenth.* That defendant never delivered, nor tendered a delivery of, any portion of said nine hundred Strowbridge sowers sold to said Young Bros., although such delivery was demanded, to the number of said implements named in said orders turned over to said defendant, if such orders constituted a demand; and said defendant refused to deliver any portion of said implements, or to perform its part of said contract in any respect whatever. But no demand was made upon defendant for performance of said contract, unless the delivery of said orders constituted such demand. *Eleventh.* That neither the plaintiff nor his predecessor in office, the said Isaac Henshie, ever tendered the defendant any security in lieu of the promissory notes of Young Bros. agreed to be made, or made application to the court for authority to carry out said contract, or to require said defendant to accept any security in lieu of said notes, or gave defendant any notice that he intended to carry out said contract."

As a conclusion of law, the district court found for the defendant, and the plaintiff appeals.

Cummins & Wright and *N. B. Raymond*, for appellant.

Lehman & Park, for appellee

GRANGER, J.—I. The point receiving the principal attention in argument is as to the effect on the contract of the insolvency of Young Bros., and the assignment for the benefit of their creditors. Perhaps it may be better stated as a query, thus: Was the insolvency and assignment a justification for the defendant company in rescinding the contract? The answer to this question is a practical determination of the case, as to the plaintiff's cause of action. Its consideration has led counsel for appellant to consider at some length the law as to the assignment of contracts, and it is urged that the assignment in question is within its contemplation. A salient feature of the case is the manner or method of payment by Young Bros. for the seeders. The contract was for nine hundred seeders, to be delivered on the orders of Young Bros., for which the firm was to give its notes. Young Bros. were to deliver the seeders to purchasers from them, and settle for the same either by receiving cash or notes. If cash, it was to be turned over to defendant, to apply on the notes of Young Bros. If notes, they were to be turned over to defendant as collateral security for the notes already given by Young Bros.

It is said in argument that the district court held the rescission valid because, after the assignment, Young Bros. were not in a position to give their notes in pursuance of the terms of the contract; from which we infer this view of the court: That the defendant was entitled, under the contract, to the notes of Young Bros., aided collaterally by the notes taken by them in the sales of the seeders. As between defendant and Young Bros., nothing less could be regarded as a compliance with the contract. It could hardly be claimed that Young Bros., in a settlement for the machines, could substitute in lieu of their note that of another person or firm, regardless of the question of solvency or value, even though aided by the collateral notes as agreed upon, for the sole and conclusive reason

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that their engagements are for notes signed by them. Such a rule needs no elaboration.

The argument, then, leads us to the query, without reference to the statutory assignment for the benefit of creditors, could Young Bros. have so assigned the contract, without the consent of defendant, as to substitute another in their stead for performance, and whose note must be accepted in lieu of theirs by the defendant? This leads us to consider the authorities cited. Counsel for appellant quotes from Code, section 2084, as follows: "Instruments in writing, by which the maker promises * * * to pay or deliver any property or labor, or acknowledges any money or labor or property to be due, are assignable by indorsement thereon, or by other writing; and the assignee shall have a right of action in his own name." Counsel then say: "Under the very broad language of this provision, this court has held that all contracts are assignable, even in cases where, by the terms of the instrument, its assignment is prohibited." And reference is made to *Moorman v. Collier*, 32 Iowa, 138, and *First Nat. Bk. of Dubuque v. Carpenter*, 41 Iowa, 518. Section 2084 is a part of the chapter on "notes and bills;" and the section deals only with instruments in writing, and tells how they may be transferred, and who may sue thereon. In both of the cases to which reference is made the court had under consideration the validity of the transfer of an instrument in writing for the payment of money; and the language used in each case is not too broad, if properly limited by the subject of its application. In *Moorman v. Collier*, the language relied on is that "all instruments, under our statute, are assignable;" and the statement takes as authority Revision, section 1796, which corresponds with section 2084 of the Code, and the language of the case is only as to "instruments." It does not say, "all contracts." The case evidently means all instruments for the payment or delivery of money, property or labor, as specified in the section and chapter. The case of *Bank v. Carpenter* was an action on a written guaranty, which was

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held assignable ; and in its discussion this language is used : "Generally, by the common law, a guaranty is not negotiable, or in any manner transferable, so as to enable the assignee to maintain an action thereon.

* * * But under our statutes this and every other kind of contract is assignable." It cites for support Code, sections 2082-2087, inclusive ; and it is said in the opinion that "even in a case where, by the terms of the instrument, its assignment is prohibited, it may be assigned." The sections referred to are the first six sections in the chapter on "notes and bills," which chapter, of course, has reference to other instruments than notes and bills, and the provisions, in brief, as to assignments are that a party entitled to recover on an instrument or an open account may transfer his right of recovery to another ; but there is nothing in the language of the chapter to indicate a legislative intent to authorize a party to a contract by assignment to transfer his obligations to perform to a third party, and thus effect his release, without the consent of his obligee. Let us suppose that A. contracts in writing to render service, as a traveling salesman, to B., for a specified compensation. Under the law, if B. shall be indebted to A. on the contract, A. may assign his claim. But suppose A. should assign his contract to C., whereby C. was to receive the pay and render the service. Must B. accept that? B. has contracted for the services of A. He is entitled to that ; and, before B. can be required to pay either to A. or his assigns, he must have what he contracted for. The law will permit a person to assign what is his, either in possession or by right of action, but not his obligations to another ; and such is the substance of the provisions of the statutes on the subject of assignments referred to. Thus we think that Young Bros. could not, without reference to the assignment for the benefit of creditors, have so assigned the contract in question, without the consent of the defendant, as to have required defendant to have accepted in lieu of theirs the notes of their assignee.

We may then inquire if there is anything in the statutory assignment for the benefit of creditors to change the rule? It is urged that the statutory provisions as to assignments for the benefit of creditors is broad enough to enable the assignee to execute any contract that might come into his hands. The difficulties of the case are not with the provisions of the statute as to the authority of the assignee. They are more with his incapacity or indisposition to execute the contract. We should not lose sight of the real question under consideration by a contemplation of what the assignee could have done if defendant, after insolvency, had been willing to deliver the seeders. It may be conceded that the contract could thus have been executed by the assignee on behalf of Young Bros. But the query is, had the defendant the right to refuse delivery of the seeders after insolvency and assignment? In other words, had it the right to terminate the contract? If it were a case of insolvency without the assignment, we think it would be conceded on authority that the obligation to deliver could only be on a tender of a cash payment in lieu of notes agreed upon. *Pardee v. Kanady*, 100 N. Y. 121. Does the fact of the assignment affect the rights of the defendant? The reason of the rule in cases of insolvency is too manifest to need explanation. A person who contracts to deliver property on credit, in anticipation of a solvent purchaser, ought not to be required to deliver it after insolvency, which is a practical confession by the purchaser of his inability to comply with the terms of the contract. If to the fact of insolvency is added that of an assignment for the benefit of creditors, why should the rule be changed? If the delivery is excused in case of insolvency because the property will not be paid for, the same reasons exist for excusing the delivery after assignment. If the insolvent did not possess a right to enforce the contract except by cash payment, he could convey no greater right to his assignee.

The argument deals with the question of the right of appellant to a delivery of the seeders upon cash payment therefor. To our minds, the record does not

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present the question for consideration. The contract was not to pay cash, but to settle by note. After insolvency defendant was not required to anticipate a readiness for cash payment; and, if either Young Bros. or plaintiff desired to make such payment, a tender to that effect should have been made. Soon after the assignment, defendant, as it should, gave notice that because of the insolvency and dissolution of the partnership the contract was rescinded. This notice was to Young Bros. If the assignee then desired to pay in cash, and have the seeders delivered, the proposition or tender should have been made. But neither the pleadings in the case, nor the findings of the court, deal with this question. The case in the district court seems to have been tried upon an issue as to the right of the assignee to carry out the contract by giving his note in lieu of that of Young Bros. The pleadings and findings have to do with a willingness on the part of the assignee to carry out the contract; but it appears only to have been a carrying out of the contract as Young Bros. were authorized to do, and not by payments in cash. A reference to the eleventh finding shows that the assignee has never in any manner indicated to defendant a purpose or desire to secure or perform the contract. Insolvency, in such cases, implies an inability to perform, on which the defendant might rely until otherwise assured.

Appellant contends, with much zeal, that the mere fact of insolvency does not put an end to the contract of sale; and several authorities are cited in support of the rule. It is not necessary for us to state an opinion on a state of facts so broad. The case *In re Steel Co.*, 4 Ch. Div. 108, cited by appellant, bears upon the question of when the facts will justify a seller on credit in refusing to deliver because of the subsequent insolvency of the purchaser. The facts in that case are that the Carnforth Iron Company, in October, 1874, contracted to supply iron to be delivered monthly, and to be paid for in installments, but on credit. The installments were delivered till in February, 1875, when the purchasing

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company called a meeting of its creditors, and said it was carrying on business at a loss, and was short of capital, and asked for an extension of time, which the creditors refused. The selling company then refused to deliver the iron except upon cash payments, and the purchasing company then rescinded the contract. The selling company then asked for damage, which the court held could not be recovered; holding that there was no such declaration of insolvency as to justify the selling company in refusing to deliver. The syllabus of the case, which appears to be supported by the opinion, deduces a rule as follows: "In order to justify the vendors, in such a case, in exercising their right of refusal to deliver, there must be such proof or admission of the insolvency of the purchasers at the time as amounts to a declaration of intention not to pay for the goods." The case does not appear to be an authority against the right of refusal to deliver where the fact of insolvency exists, and is so evidenced as to amount to a declared purpose not to pay. It is the fact of the insolvency that seems to be the turning point in the case, and that would surely seem to be the reasonable rule. The case of *Morgan v. Bain*, L. R. 10 C. P. 15, also cited by appellants, was one for the delivery of iron on credit; and the purchasers became insolvent. Lord COLERIDGE, C. J., in his opinion, said: "It is not disputed that upon the occurrence of insolvency the vendor would not be bound to deliver to the insolvent purchaser an installment of the iron becoming due, without a tender of the price." BRETT, J., in the same case, said, without committing himself to the theory that the mere fact of insolvency would *per se* put an end to the contract, that such fact, with that of notice to the seller of the insolvency, would justify an assumption by the seller that the purchaser intended to abandon the contract. The notice upon which he relied, and gave his adherence to the holding in that case, was the commencement of insolvent proceedings under the bankrupt act. In this case the fact of the insolvency is unquestioned, and a like notice is given by an insolvent

proceeding for the benefit of creditors. Hence it seems the defendant, in this case, is within any of the rules cited. Other authorities cited by appellant are not more favorable to his position.

II. Defendant presented a counter-claim, based on an open account, alleging a balance due of \$27.98, as to which the court established a claim against the estate of Young Bros. for twenty-seven dollars, based on the following finding of facts: "*Twelfth.* On defendant's counter-claim, the court finds that defendant received orders from Young Bros. for the goods mentioned in the account under dates September 5, 6, 8, 15 and 17, 1884; that these orders were treated in the usual way, the usual directions given for shipping, and the goods charged on the books to Young Bros.; that both of Young Bros. were on the witness stand, and neither of them denied having received the goods; that, the balance of defendant's counter-claim not being denied, the defendant should recover the sum of three hundred and twenty-seven and ninety-eight one-hundredths dollars, less the sum of three hundred dollars due the plaintiff for commission earned by Young Bros. under the contract of 1883, declared on in plaintiff's petition." It is urged that the proofs are not sufficient to sustain the finding. The argument concedes a practical dispute in the testimony, and the finding has the force of a verdict by the jury. The evidence is such that we cannot interfere.

III. It is next said that it was error to enter a personal judgment against the assignee. The assignment is in these words: "The court erred in rendering a personal judgment against the plaintiff herein for the balance due upon defendant's counter-claim, for the reason that such judgment is contrary to law and the evidence. Said defendant was entitled only to the establishment of his claim as a creditor of said estate." The assignment is not sustained by the record. The judgment of the court is merely the establishment of a claim against the estate. It is not a personal judgment. It would

2. —: personal
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only be subject to *pro rata* payment, like other claims. The wording of the judgment is "that such be and is hereby established as a claim against the estate of Young Bros., and against the said Rappleye as their assignee." These words have no other meaning than the establishment of the claim. It would appear that appellant has based this assignment rather upon statements in the abstract with reference to the judgment than upon record of the judgment as copied in the abstract.

AFFIRMED.

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107	605

79	232
114	82

79	232
138	424

NEVILLE V. THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

1. **Negligence: PLEADING: GENERAL AVERMENTS: SPECIFIC ACTS.** Although negligence of a particular kind is not specially alleged, it may still be a ground of recovery, if it is fairly covered by the averments of the petition. (See opinion for illustration.)
2. **Railroads: INJURY TO CAR-COUPLER: NEGLIGENT IGNORANCE OF ENGINEER AND FIREMAN.** Since it may have been negligence in this case for the engineer and fireman not to know that plaintiff had gone between the locomotive and an attached car to uncouple the car, the court properly refused an instruction which ignored that fact.
3. **Instructions: TO BE CONSIDERED TOGETHER: BURDEN OF PROOF.** An instruction in this case, which might be construed as wrongfully placing the burden of proof on defendant, is no cause for a reversal, since other parts of the charge clearly placed the burden on plaintiff.
4. **———: ———: CONFLICT.** An instruction to find for plaintiff upon finding certain enumerated facts, but which ignores a fact necessary to be found in order to justify a verdict for plaintiff, is not cured by another instruction from which the jury might infer the necessity of the ignored fact; nor even by an instruction which makes the finding of that fact necessary; for then the instructions are in conflict, and it cannot be known which one the jury followed. (See opinion for illustration.)
5. **———: ASSUMPTION OF FACT IN DISPUTE.** It is error in an instruction to assume as a fact a material matter which the evidence has left in doubt.

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Appeal from Jones District Court.—HON. J. H. PRESTON, Judge.

FILED, JANUARY 31, 1890.

ACTION to recover for personal injuries alleged to have been sustained by plaintiff in consequence of negligence and wrongful acts on the part of defendant. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

Hubbard & Dawley, for appellant.

Ezra Keeler and J. W. Jamison, for appellee.

ROBINSON, J.—On the first day of February, 1888, plaintiff was an employe of defendant; and, in the discharge of his duties, was required to assist in switching cars in the town of Strawberry Hill. On the day named a locomotive engine of defendant, in charge of an engineer and fireman, was run onto a sidetrack of defendant in Strawberry Hill, for the purpose of removing a coal-car therefrom, and placing it on another sidetrack, known as the "Wood track." The front end of the engine was coupled to the car by means of the pilot-bar, and was then run backwards, drawing the car, until the latter was clear of the wood-track switch. Plaintiff, in the discharge of his duty, threw the switch so as to open the wood track; and the engine, with the car in front, was then moved forward onto the wood track. That extended from the switch eastward. The engineer was in his proper place, on the south side of the engine cab, while the fireman was on the north side. Plaintiff stopped a few feet eastward from the switch-block, and, as the car passed him, stepped between it and the pilot of the engine, putting his left foot on the north rail, and attempted to make an uncoupling. His first attempt failed, and he then placed his right foot a few inches inside the north rail,

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while he was facing southward, and again attempted, successfully, to remove the coupling-pin. While in the position last named, his right leg was struck by the pilot. He threw himself, or was thrown, onto the pilot, to which he clung, with his right foot under the pilot, and in that position was carried some distance to a frog, where his foot was caught, and in some manner he was thrown to the ground, and his right leg was crushed, rendering amputation necessary. The plaintiff claims that while he was between the car and pilot the employes in charge of the engine, without any signal from him, negligently increased the speed of the engine, thereby causing his foot to be caught, and that, knowing his leg was under the pilot, and knowing the danger to which he was subject, in time to have stopped the engine before the injury was sustained, they negligently permitted the engine to run forward a distance of fifty feet, until the frog was reached, and the leg crushed. The answer of defendant is a general denial.

I. The evidence shows that the engineer and fireman did not know that plaintiff had attempted to make

1. NEGLIGENCE: pleading: general aver- ments: specific acts.	the uncoupling until his leg had been caught, and he was on the pilot. Defendant complains of the refusal of the court to give, at its request, an instruction as follows:
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“(5) The plaintiff is not entitled to recover on the ground that the fireman failed to observe that plaintiff went between the engine and car, because plaintiff has not alleged any negligence in that respect.” It is true the specific negligence referred to in the instruction is not pleaded, in terms, in the petition. But it is alleged that plaintiff stepped between the car and engine to make the uncoupling in the line of his duty; that, with due care on the part of the employes having charge of the engine, it could have been done with ordinary safety; that it was the duty of said employes to be watchful of plaintiff while he was exposed to danger in discharge of the duty aforesaid, to obey promptly any signal or direction he might give to stop the engine,

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and, in case of any accident to plaintiff while so engaged, to stop said engine as soon as possible; that when his leg was caught he gave directions to stop the engine, but they were unheeded, and the engine was not stopped until too late to prevent the injury. We are of the opinion that the failure of the fireman, whose position in the cab at the time placed the duty upon him, if upon any one, to observe that plaintiff went between the engine and car to make the uncoupling, was negligence within the allegations of the petition, and that the instruction in question was properly refused.

II. Defendant asked the following instruction:

“(6) If it does not appear, upon fair consideration of the testimony, that the speed of the train -

2. RAILROADS:
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gineer and
fireman.

was increased by giving the engine further steam, or that the engineer and fireman knew that Neville had gone between the cars, to uncouple them, before the outcry was made by Neville, and failed to stop as soon thereafter as possible, no negligence is made out against the defendant, and you should return a verdict accordingly.”

The instruction is erroneous, in that it ignores the fact that the failure of the engineer and fireman to know that plaintiff had gone between the engine and car may have been negligence, and was properly refused. On the same subject the court charged the jury as follows:

“(9) If, on the other hand, you find from the evidence that plaintiff was negligent, as explained to you, * * * and that such negligence contributed to his injury, and

that said engineer and fireman, or either of them, did not know that plaintiff was in a place of peril, nor of such negligence of the plaintiff, and by the exercise of reasonable and ordinary care could not have avoided the injury to plaintiff, then you will find for the defendant.”

Defendant complains of this instruction that, while it may have been designed to embody the substance of the sixth one it asked, yet that it was erroneous in that it placed upon defendant the burden of proving that

3. INSTRU-
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proof.

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the men on the engine did not know of the peril of plaintiff, instead of requiring plaintiff to prove that they did have such knowledge. The language of the instruction is not to be commended, and, if not modified or explained, might have been prejudicial to defendant. The jury were instructed that under the issues of the case it was "incumbent upon the plaintiff to prove, by a preponderance of the evidence, not only that he has sustained injury, and consequent damage, on account of the negligence of defendant, its servants or employes, but also that he himself was not guilty of any fault or negligence which contributed to any injury received by him." They were also instructed to return a verdict for defendant unless they found from the evidence, among other issues, that there was negligence on its part. It is apparent, from the charge as a whole, that the jury could not have understood that the burden of proving want of knowledge was on defendant in the first instance.

III. The fifth paragraph of the charge to the jury is as follows: "(5) By the allegations of the petition, 4. —: —: plaintiff claims that defendant, by its ^{conflict.} servants and employes, was guilty of negligence in the following particulars: (1) Increasing the speed of the engine without signal or order; (2) disregarding the signal or order of plaintiff to stop; (3) failing to stop after knowing the peril to which plaintiff was exposed. If you find from the evidence that about February 1, 1888, at the town of Strawberry Hill, the plaintiff stepped between the said engine and coal-car, while the same were in motion, for the purpose of uncoupling the same; that it was a part of plaintiff's duty so to do; that the engineer and fireman in charge of said engine, or either of them, knew of plaintiff's whereabouts at the time; that the speed of the engine was thus increased without signal or order from plaintiff; that plaintiff's foot or leg was struck by the pilot of said engine, and forced under the same; that, while in such position, plaintiff called loudly, and signaled

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the employes of defendant in charge of said engine to stop, that said employes, or either of them, knew of plaintiff's perilous position, and heard said calls, and failed to stop said engine, by reason of which plaintiff received the injury in question,—then you would be warranted in finding that defendant's servants and employes were negligent. And if you further find from the evidence that defendant, its servants and employes, were guilty of negligence on account of which plaintiff sustained injury, and that plaintiff was himself free from any fault or negligence which contributed to the injury received by him, then you will find for the plaintiff. If, on the other hand, you do not find from the evidence that the foregoing matters are established, then you will find for the defendant." Appellant urges numerous objections against this instruction. The first is that in view of the fact that the evidence shows that the men on the engine knew of plaintiff's position on the pilot before the leg was in fact crushed, and failed to stop the engine in time to prevent it, the instructions, in effect, charged the jury to find for the plaintiff. The portion of the instruction to which this objection is directed is as follows: "If you find * * * that said employes, or either of them, knew of plaintiff's perilous position, and heard said calls, and failed to stop said engine, by reason of which plaintiff received the injury in question, then you would be warranted in finding that defendant's servants and employes were negligent." It is claimed that the words "to use ordinary care" should have been inserted after the word "failed." We think the instruction is vulnerable to the objection made. Appellant claims, and there was evidence tending to show, that as soon as plaintiff's position on the pilot was known the men on the engine instantly used every available means for stopping the engine. If they had not been previously negligent, their efforts to stop the engine, if they were as claimed by defendant, would have released it from liability; but the instruction ignored that fact. It is said that

the error was cured by the eighth paragraph of the charge. That is as follows: "(8) If, under all the evidence and the foregoing instructions, you find that the plaintiff was negligent, still the defendant cannot escape liability if the act which caused the injury was done by defendant's servants and employes in charge of said engine after they, or either of them, discovered plaintiff's negligence, if you find from the evidence that defendant's said servants and employes could have avoided the injury, in the exercise of ordinary and reasonable care." If all that is claimed for this paragraph of appellee be true, the two paragraphs would be conflicting, and it would be uncertain which one the jury followed. But the eighth paragraph does not state that ordinary and reasonable care would release defendant from liability. It refers to an act, and not to an omission, which caused the injury, and, under the issues and evidence, may have been understood to refer to the alleged increasing of the speed of the engine after plaintiff attempted to make the uncoupling. If it be conceded that the eighth paragraph instructs as claimed by appellee, yet it is apparent that it does so indirectly, and that the meaning claimed, so far as it applies to the point under consideration, is deducible by inference only. An inference of that kind will hardly overcome a positive averment in conflict with it.

IV. A further objection, made to the fifth paragraph of the charge, is that it assumes that the speed of the engine was increased after plaintiff attempted to make the uncoupling. That seems to be the case. The language is: "If you find from the evidence * * * that the engineer and fireman in charge of said engine, or either of them, knew of plaintiff's whereabouts at the time that the speed of the engine was" thus increased, etc. The question of the alleged increase of speed was important. The evidence of plaintiff shows that he placed his right foot a few inches inside the north rail, while facing south, and stood without moving it; that he attempted to pull the coupling pin with his right hand; without

5. — : assumption of fact in dispute.

St. Louis Refrigerator Co. v. Vinton Wash. Mach. Co.

taking hold of anything with his left; and that while so standing he was struck by the pilot. Other evidence tends to show that the engine was then moving at the rate of three or four miles an hour, and that plaintiff's right foot could not have been placed more than three feet in advance of that part of the pilot by which he was struck, or, in other words, that the pilot would have been in contact with his leg in from one to one and one-half seconds after he stepped inside the rails. Plaintiff claims that the engine was barely moving when he stepped inside the rail; and it is apparent that, unless that was the fact, the jury may well have found that plaintiff was guilty of contributory negligence. Hence the disputed question in regard to the increase of speed after plaintiff stepped in front of the pilot was a vital one. In our opinion, the fifth paragraph of the charge was erroneous, and should not have been given.

V. Appellant discusses objections to other portions of the charge, and complains of the refusal of the court to give certain instructions asked. What we have said disposes of some of the questions thus raised, and others are not likely to arise on another trial. Some of the instructions refused were more in the nature of arguments than of instructions, and were properly refused for that reason. Others assumed to be true matters about which there was a conflict of evidence. But we do not deem it necessary to consider at length other questions raised in this court, for reasons stated. For the errors pointed out, the judgment of the district court is

REVERSED.

THE ST. LOUIS REFRIGERATOR AND WOODEN GUTTER
COMPANY V. THE VINTON WASHING-MACHINE
COMPANY.

79	239
100	432
79	239
140	711

1. **Evidence:** PAROL TO EXPLAIN WRITING: SALE: AGENCY. Plaintiff's agent orally offered to sell defendant ten carloads of "Star Poplar" lumber at a certain price. He knew the purpose for which defendant wanted the lumber, and was informed that nothing but dry lumber would answer, and he represented that

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the grade known as "Star Poplar" would meet the requirement. "Star Poplar," however, was a grade that might be either green or dry. Afterwards, defendant wrote to plaintiff, stating the offer of the agent to furnish "Star Poplar," and accepting the offer, but saying nothing about the lumber being dry,—supposing, from the agent's statement, that that grade was always dry. After some hesitation plaintiff agreed by letter to furnish the lumber at the price named by the agent. Some of the lumber shipped was not dry, and defendant refused to receive any more of it. In an action for the price, *held* that, while the contract, as evidenced by the letters, was for "Star Poplar," which might be either green or dry, plaintiff was bound by the agent's representations that it was dry; and evidence of what the agent said was competent to show the kind of lumber which defendant had contracted for. (See opinion for citations.)

2. **The Same: ESTOPPEL.** In such case, defendant was not estopped to deny that its letter expressed the whole contract as to the character of the lumber, though it omitted to say that it was to be dry; because plaintiff, by its authorized agent, had given defendant to understand that the expression "Star Poplar" always meant dry lumber.

Appeal from Benton District Court. — HON. L. G. KINNE, Judge.

FILED, JANUARY 31, 1890.

ACTION to recover a balance alleged to be due for lumber sold and delivered. Defendant pleaded a counter-claim. There was a trial by jury, and a verdict and judgment for defendant. The plaintiff appeals.

Gilchrist & Whipple, for appellant.

G. W. Burnham, for appellee.

ROBINSON, J.—The plaintiff sold and delivered to defendant six carloads of lumber, and seeks to recover a balance alleged to be due thereon of \$259.72. Defendant admits having received the lumber, but alleges that a part of it was not of the kind and quality agreed upon and ordered, and claims damage for the alleged breach of contract. The verdict and judgment

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in favor of defendant were for eighteen dollars, besides costs.

I. Appellee claims that a part of the agreement for the purchase of the lumber in controversy was verbal, and that it was made with an agent of plaintiff, named Cordry. Appellant contends that the agreement was wholly in writing, in the form of correspondence between the parties, carried on after the alleged agreement with Cordry was made, and that the court erred in permitting appellee to prove the Cordry agreement. That was made in October, 1885. At that time defendant was engaged at Vinton in the business of manufacturing washing-machines, and required dry poplar lumber of a particular description for that purpose. Cordry represented to it, in substance and effect, that the kind of lumber it desired was known as "Star Poplar;" that one-half of it was sixteen inches or more in width, and sufficiently good to furnish sides for the washing-machines; that the remainder of it was common, narrow lumber; that all of it should be "bone dry" when it was received by defendant; that it would be far superior to a pile at the factory door to which his attention was called, and that plaintiff did not manufacture so poor a grade as that. He was informed that defendant could not use any lumber which was not dry. It is shown that at that time there was a grade of lumber known in trade at St. Louis and in the South as "Star Poplar," and the evidence tends to show that the lumber shipped by plaintiff to defendant to fill the agreement in controversy was of that kind, but defendant had no knowledge of what was required to constitute that grade, excepting that derived from Cordry.

On the twenty-second day of October, 1885, defendant wrote to plaintiff as follows: "Your agent called on us yesterday to further furnish us with lumber designated as "Star Poplar," and proposed to sell us ten carloads at \$18.50 per thousand, two per cent. off, delivered at St. Louis, and to be ordered by us in single carload lots at

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such time as we may order; the entire shipment to be made in six months from date. Half of said lumber to be sixteen inches wide and upwards, and balance from seven to twelve inches and upwards; to be dressed on both sides, seven-eighths inch in thickness. This proposition was left by your agent for us to consider, which we hereby accept, expecting the shipment from West St. Louis. * * *” The plaintiff at first refused to recognize the agreement on the ground that the price should be twenty dollars per thousand, but November 2, 1885, it wrote to defendant as follows: “* * * Our Mr. Cordry says that he said he would submit the offer at the price you mention, but did not take any order, or state the order would be accepted at that price. But your letter seems to be very positive, and we know our Mr. Cordry to be careless, and we will ship you a car this week. * * *” The evidence tends to show that the first two carloads received by defendant were reasonably satisfactory; that the next four carloads were not so good as the lumber of Star Poplar grade was represented to be by Cordry, in that the proportion of wide lumber was less, and it was so wet as not to be in condition for use. The agreement for the remaining four carloads was then canceled. Appellant contends that whatever agreement the parties had prior to the letter of October 22, 1885, and the acceptance of its terms, it was in law merged in the written contract as expressed in the correspondence, and that the court erred in permitting the representations of Cordry to be treated as a part of the contract. It may be that in recognizing the contract and shipping the lumber the plaintiff had no actual knowledge of what Cordry had said, excepting of that part disclosed by defendant's letter. But Cordry's authority to bind the plaintiff cannot be questioned. The evidence shows that lumber of the grade in question may be either green or dry; that lumber is sometimes graded when green, and becomes Star Poplar when graded; that plaintiff had lumber of that grade in its yards when the

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agreement was made, which was from two to twelve months old, of which some was green or wet, and some was dry. Plaintiff was chargeable with Cordry's knowledge of his representations, and his knowledge of the use for which the lumber was ordered by defendant. It appears that, although Star Poplar grade included both wet and dry lumber, it was not necessarily mixed. The letter of defendant ordered Star Poplar lumber, and we think it did not contradict the terms of the writing to show what Cordry had represented and agreed in regard to the kind of lumber in the grade ordered which should be sent. But for his participation in the making of the contract, plaintiff could have discharged its obligation by sending either wet or dry lumber of the grade named. But the contract was substantially made by Cordry, and ratified by plaintiff. It is, therefore, bound by all the provisions of the agreement, whether actually known to it or not. *Farrar v. Peterson*, 52 Iowa, 420; *Eadie v. Ashbaugh*, 44 Iowa, 520. The quality of lumber required by defendant was fully understood by Cordry. It was known to him, and constructively by plaintiff, that defendant could not use wet lumber. It is clear that defendant did not intend to contract for that kind of lumber, and plaintiff knew it. Therefore, to construe the agreement, as appellant contends it should be construed, would enable plaintiff to perpetrate a fraud upon defendant. The language of the correspondence is not such as to require that construction; hence it should be so construed as to carry into effect the real agreement and intent of the parties. See *Thompson v. Locke*, 65 Iowa, 432; *Pilmer v. Bank*, 16 Iowa, 322; *Merriam v. United States*, 107 U. S. 437, 2 Sup. Ct. Rep. 536; *Dayton v. Hooglund*, 39 Ohio St. 680.

II. It is claimed that defendant is estopped from asserting that the letter of October 22, 1885, did not fully exhibit the terms of the agreement with Cordry, for that plaintiff believed it to contain a full statement of the terms proposed by its

2. THE same:
estoppel.

St. Louis Refrigerator Co. v. Vinton Wash. Mach. Co.

agent, and acted upon that supposition in ratifying the agreement and shipping the lumber. But that theory ignores the fact, as claimed by defendant and proven, that Cordry was fully authorized to contract for plaintiff, and that he submitted a proposition to be presented to the board of directors of defendant, which was acted upon and accepted by that board, and that the letter in question was a notification to plaintiff that its offer had been accepted. Defendant had no reason to state in that letter that the lumber must be dry, for the reason that Cordry had represented that it would be dry, over a year old, and knew that defendant could not use it while green, while it does not appear that defendant then knew that the grade named ever included green lumber. The first two carloads corresponded with the representations of Cordry. Before the first car was shipped under the agreement in controversy, defendant wrote to plaintiff that it expected the car it was to ship that week would "prove, as Mr. Cordry stated, a higher grade" than they had theretofore had; thereby informing plaintiff that representations as to the quality of the lumber, other than the naming of its grade, had been made by Cordry. When the third carload was received by defendant it at once notified plaintiff that it was not satisfactory, and that it was to have dry, seasoned lumber, and hoped it would be able to ship perfectly dry lumber at once. Defendant complained of each of the carloads subsequently sent, reiterating its claim that the lumber was to be "bone dry," and when the sixth one came to hand refused to take any more of the kind sent. Under these circumstances, we are of the opinion that an estoppel was not shown. The letter of October 22, 1885, embodies the agreement of the parties, excepting the definition of the terms used therein to designate the lumber sold, and plaintiff was chargeable with knowledge of the kind which defendant had a right to demand.

III. Objections are made to portions of the charge to the jury. It might have been made more explicit in

The State Ins. Co. v. Jamison.

some respects, and in one or two matters of minor importance it may not have been quite accurate, but, taken as a whole, we think it instructed the jury as to their duties quite fully and fairly, and that plaintiff could not have been prejudiced by anything of which it complains.

IV. It is claimed that the verdict was excessive. There was evidence to sustain a verdict for about the amount found by the jury. If it is too large, the excess is merely nominal, and we should not be justified in disturbing the judgment on that ground.

AFFIRMED.

79	245
1107	170
79	245
126	278
126	281

THE STATE INSURANCE COMPANY V. JAMISON.

Fire Insurance: FAILURE OF AGENT TO REPORT RISK: DAMAGES: PROXIMATE CAUSE: EVIDENCE. Defendant was plaintiff's agent, authorized to issue policies, but charged with the duty of promptly reporting risks taken. Defendant issued a policy, but neglected to report the same to plaintiff, as was his duty, and plaintiff did not know of the risk until after the insured property had been consumed by fire. Plaintiff paid the loss, as it was legally bound to do, and in this action it seeks to recover the amount of defendant on the ground of his negligence. *Held* that it was competent for plaintiff to introduce evidence tending to show that if defendant had duly notified it of the risk it would have cancelled the policy before the fire, as it had the right to do, and thus avoided the loss; because, if it could establish that fact, it would appear that defendant's negligence was the proximate cause of plaintiff's damage, and defendant would be liable therefor. (See opinion for citations.)

Appeal from Wayne District Court.—HON. JOHN W. HARVEY, Judge.

FILED, FEBRUARY 1, 1890.

THE defendant, John Jamison, was, in 1884, the recording agent of the plaintiff at Seymour, Iowa, having authority to issue policies. It was his duty, and he was instructed, to make to the company a daily report

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of all the policies issued by him, giving a full and complete description of the policy, as well as the property insured. On the second day of August, 1884, Jamison issued a policy of insurance on behalf of the plaintiff company to the Independent Order of Odd-Fellows, insuring a frame hall and furniture, in the aggregate fourteen hundred dollars. He made no report of this policy until after the property insured by it was burned, on the ninth day of August, 1884. The company paid the loss in full, and brings this suit to recover the amount paid to the insured, on the ground that the defendant negligently failed to perform his duty, and thus prevented the company from exercising its right to cancel the risk. Upon the trial the court, at the close of plaintiff's testimony, directed the jury to find for the defendant, and gave judgment for the defendant, from which the plaintiff appeals.

Cummins & Wright, for appellant.

Freeland & Miles and *W. F. Vermilion*, for appellee.

GRANGER, J.—The specific errors assigned and argued have reference to the action of the court in excluding evidence. The ground upon which the court instructed the jury to return a verdict for the defendant does not appear, as the defendant's motion for that purpose is not in the record. However, from the argument of counsel we infer that the ground of the ruling was that the damage sought to be recovered was not the proximate result of the wrongs complained of, or, in other words, that the loss did not result from the failure to report the policy. To a proper understanding of the court's rulings upon the testimony offered, a few facts should be well in mind: (1) That the insurance company had paid the policy issued by its agent, the defendant; (2) that the loss occurred after the policy issued, and before the agent notified the company of its issuance; (3) that it was the duty of the defendant to

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give such notice on the day a policy issued, in order that the company might avoid the policy if it so elected. (4) that the company was, in any event, liable on the policy until it was canceled.

A fact which the plaintiff sought on the trial to establish was that, if the notice had been given by the agent (defendant) of the issuance of the policy, it would have been annulled, and the company's liability avoided. As we understand, the court excluded all testimony tending to establish this fact, and the principal inquiry on this appeal is, should the evidence have been admitted? Or, in other words, is the fact sought to be established a material one in the case? By the terms of the policy the company had the right to cancel it when reported by their agent. If the policy had been reported and canceled before the fire, the loss of the company would certainly have been avoided. The company, in making its contract with the agent, whereby he could issue policies, had taken the precaution to direct that the company should be notified on the day a policy issued, that it might determine the character of the risk, and continue or cancel it, as it thought advisable. Such a direction is certainly judicious, and in the interest of safe business management. Keeping in view the fact that the object of the prompt reporting of policies issued was to enable the company, and not the agent issuing the policy, to judge of the character of the risk, we think we may satisfactorily determine this question.

Appellee, in argument, says: "Was plaintiff's loss the direct or natural result of defendant's failure to report, or was the defendant's failure to report to plaintiff the proximate cause of plaintiff's loss?" Appellee answers in the negative. But let us consider the question. We think appellee submits his query with reference to the loss of plaintiff, but in his reasoning and conclusion he has in view the loss of the assured. He says: "The fire was the cause of plaintiff's loss, and surely defendant's neglect to report in no way caused the fire." That is true; but the real question is, did defendant's neglect

to report cause plaintiff to pay for the loss by fire? The fire would have occurred without any reference to the policy or the report, and the loss would have been paid. But the loss to the plaintiff depended entirely on the existence of the policy. The policy was in existence when the loss occurred, and the plaintiff was made liable for its payment. Now, was it in existence in consequence of the wrongful act of the defendant? Admitting it, and it must be conceded that such wrongful act or neglect caused the loss to the plaintiff; and we think it must be conceded that it was a direct result of the wrongful act. Admit for the argument that the policy would have been canceled if the report had been duly made. It is exactly equivalent to admitting that the policy at the time of the fire would not have been in existence, and hence no liability of the plaintiff.

Appellee refers to the case of *Kimball v. Connolly*, 2 Abb. Dec. 504, but the holding there is upon facts very dissimilar. In brief, the point in that case is that a party desiring to obtain a loan applied to the clerk to have the records searched as to the title of the land to be offered as security. The law of New York made it the duty of the clerk to have "searchers" in his office for that purpose, and made it the duty of the clerk to certify to the correctness of the return, and also made him liable for errors, etc. In that case the return omitted a certain judgment, but upon the title as returned by the clerk the loan was obtained. The premises were afterwards sold by virtue of the omitted judgment, and the executor of the party who had procured the search and return paid quite a large amount to secure a reconveyance of the land. The suit was for damage against the clerk for error in the return as to title. The court held that there could be no recovery, but based its holding on the fact that Mrs. Le Roy, who procured the return, "bought no property, and parted with nothing of value by reason of the erroneous return." The case practically holds that the return was obtained to secure the loan, and that it was secured; that the loan company

might have been subjected to loss by the security being insufficient because of the lien not reported. The court says it was no injury to Mrs. Le Roy to have the money paid to her, instead of being paid by the loan company in satisfaction of the judgment. Appellee quotes the following language from the opinion in the case, and seems to rely upon it: "However probable it may be that the judgment would have been paid off by the insurance company out of the proceeds of the loan, if it had been returned upon the search, it is impossible to declare at this time that it would have certainly been so applied. Her object in causing the search to be made was not defeated by the omission to return the judgment. She did not seek information about her title for any purpose but that of obtaining the loan. It is no ground of complaint that she was not awakened by the return to take action for the removal of this judgment. The knowledge which she would have derived from the return of it would have been merely incidental; and it is uncertain whether the return or the knowledge thereby acquired would have been applied by Mrs. Le Roy to any purpose whatever. No one can say what actually would have been done under a different state of facts from those which actually occurred. It is no answer to say that she could, or that she might, have paid the judgment, or prevented a sale. It does not make it certain that it would have been done. The payment was not a necessary consequence of a correct return by the clerk, and without such a direct and necessary result to flow from this act or omission the defendant cannot be made chargeable with damages."

As we understand, this citation by appellee is to show that the fact that the policy would have been canceled if it had been reported cannot be established; that it is not susceptible of proof. It seems to us that the citation from the opinion is rather against than in support of such a rule. The entire reasoning of the case is that Mrs. Le Roy was not seeking the return for information that she might know of incumbrances and

pay them off, but to show a title on which to obtain a loan, and that with the title as it was returned, she obtained the money, which would otherwise have gone to pay the judgment. There does not appear to have been an attempt to prove that she herself would have paid off the judgment had she known it after the loan was obtained. It is in view of such facts that the court, in the opinion, says: "It is uncertain whether the return, or the knowledge thereby acquired, would have been applied by Mrs. Le Roy to any purpose whatever. * * * It is no answer to say that she could, or that she might, have paid the judgment, or prevented a sale. It does not make it certain that it would have been done."

There is no purpose in this case to show that the policy could or might have been canceled, but the attempt was to prove that it would have been done. There is nothing in the New York case to show, or from which it could be inferred, that if the return had been obtained to guide her in the discharge of liens against the land, and the error had occurred by which she suffered damage, she might not have shown that if the judgment had been returned she would have paid it off, and avoided the damage. The case of *Smith v. Telegraph Co.*, 7 Ky. Law. Rep. 22, is cited by appellee. The case is this: A broker had purchased stocks for the plaintiff, and attempted to inform him of the purchase by telegram. The telegraph company negligently failed to deliver the message. The market declined, margins were not put up, and the broker, not hearing from his principal, sold the stocks at a loss, to recover which the suit was brought. The court held there could be a recovery of no more than nominal damages, because the damages claimed were uncertain, remote and speculative. It must be conceded that the rule in that case is closely drawn upon the facts stated, and the conclusion seems to be based on the theory that the damages sought "could not in the ordinary course of events have been expected to arise from" the cause of

action. That cannot be said of the case at bar. The defendant was engaged in the business of insurance. It must have occurred to him that a principal object of an early report of policies issued was for the company to determine if it would carry the risk, and the payment of any loss that might occur under the terms of the policy is just the damage that reasonably might have been anticipated. The citations from Sutherland on Damages are in harmony with the rule we here announced. There is no conflict as to the rule of law, if the facts are properly understood.

A question in the case is, how can it be established that the company would have canceled the policy if it had been duly reported? Of course, the fact, under the testimony, must be determined by the jury. But suppose it should appear in testimony that the company had an invariable business rule that it would carry only a certain number of risks in a single block or row of buildings, and that in many and all cases where a risk in excess of the number had been reported it had been canceled, and that this case came clearly within such a rule: and let it be added that this was an extra hazardous risk; that it was such a risk as is generally refused by insurance companies, and such a one as to the ordinary observer would be unsafe and undesirable. Hundreds of facts are established between litigants upon evidence less satisfactory and conclusive. In judicial proceedings it is often necessary and proper to establish what a party would have done under certain facts in fixing the liability of another. Suppose A., as the agent of B., is stationed in Iowa to purchase and forward horses to B. in New York, to be sold on the market, and his instructions are to forward the purchases of each week on the Monday following. After several weeks he neglects to forward as directed, for a particular week, and before the horses are received there is a decline in the market, and a loss of five hundred dollars. Must B. lose the five hundred dollars because it could not be shown that he would have sold the horses

if they had been forwarded? If it should appear in evidence that he had from week to week been selling under the same circumstances, and he should testify that if the horses had been there he would have sold them, would not the testimony justify a finding of the fact?

The most numerous, and, we may say, notable, cases of this character grow out of the failure of telegraph companies to deliver dispatches, and damages are asked because of the failure to deliver, and the loss to the plaintiff has resulted from a failure to sell in the market; and in such cases the question is directly involved, if the party would have sold. The case of *Parks v. Telegraph Co.*, 13 Cal. 423, is directly in point; and upon this precise question the court said: "To ascertain the damages sustained by the breach of this contract these inquiries are pertinent. If the message had been sent, was the plaintiff's agent in Stockton at the time? And would he have received it? Next, would he have then taken out an attachment on the debt? At what time could he have done this? Could he have given security? Could he have procured attorneys to issue the writ? At what hour could and would it have been put in the hands of the sheriff? Was property there of the debtor's subject to the writ? If a telegraphic dispatch had reached the agent at eight o'clock on the seventh, the agent would have been bound to act at once. It is to be presumed that he would have done so. At least he can testify whether he would." *U. S. Telegraph Co. v. Wenger*, 55 Pa. St. 262, involves precisely the same principle. It was a question what the party would have done. Wenger purchased stock at an enhanced price, because of a failure to deliver a message, and the case presented the query what he would have done if the message had been delivered. The inquiry was held proper, and a recovery had. The books abound with cases where the principle or rule is recognized, though not questioned, which shows its relation to and importance in the business affairs of the country. In this connection, see the

Potts v. Tuttle.

following cases: *Manville v. Telegraph Co.*, 37 Iowa, 214; *Thompson v. Telegraph Co.*, 64 Wis. 531; 25 N. W. Rep. 289; *Rittenhouse v. Telegraph Line*, 44 N. Y. 263; *True v. Telegraph Co.*, 60 Me. 26.

In the record are set out some eleven questions, or questions and answers, on which rulings were had and exceptions taken, and directed to the establishment of the fact in question, but the arguments have been directed to the general proposition above discussed, and not to the particular assignments, and hence we think it not important to notice them severally; the several rulings having likely been made under the court's view of the one proposition of law. We think the fact sought to be established is a material one in the case, and reasonably susceptible of proof, and that in excluding the testimony for that purpose, and instructing the jury to return a verdict for the defendant, the district court erred.

REVERSED.

POTTS V. TUTTLE *et al.*

79	253
131	13

Mandamus: RIGHT TO EXPIRED TERM OF OFFICE. A peremptory writ of *mandamus* will not issue to compel a canvassing board to reassemble and canvass the return of votes for an office, and to declare the candidate who received a majority of the votes cast therefor to be elected thereto, after the expiration of the term for which he was elected; because the writ, if issued, could have no practical effect. (Compare *State v. Porter*, 58 Iowa, 19, and *Railway Co. v. Dey*, 76 Iowa, 278.)

Appeal from Polk District Court.—HON. MARCUS KAVANAGH, JR., Judge.

FILED, FEBRUARY 1, 1890.

ACTION of *mandamus*. A demurrer to the petition was sustained, and plaintiff appeals.

Morgan & Evans, for appellant.

C. P. Holmes, for appellees.

ROBINSON, J.—The petition alleges that on the date of the general election of the year 1888 the plaintiff was a resident of Saylor township, in Polk county, and was a candidate for the office of constable to fill a vacancy, that he was eligible to said office, and received therefor fifteen votes, which was a majority of all the votes cast for said office; that the judges of said election made due return of said votes, as required by law; that defendants were members of the board of supervisors of Polk county, and met at Des Moines for the purpose of canvassing the returns of said election, but refused to canvass the votes cast for plaintiff for said office, and refused to declare him elected thereto; that plaintiff demanded of said board that they canvass the votes cast for him as aforesaid, and declare him elected to said office, but that defendants refused to do so, whereby plaintiff sustained damages in the sum of five hundred dollars; that plaintiff is personally interested in the matter. Plaintiff asks that a peremptory writ of *mandamus* issue to compel defendants to reassemble as a canvassing board, and canvass the votes cast for plaintiff, and declare him duly elected to said office, and to certify accordingly. The grounds of the demurrer are stated as follows: “(1) Said petition shows that the term of office to which plaintiff claims to have been elected expired on the first Monday of January, 1889, while this action was not returnable until the Tuesday thereafter, and the writ of *mandamus* will not issue where the issuance will be unavailing. (2) Said petition shows that the term of office to which plaintiff claims to have been elected in November, 1888, expired before the writ could have been issued, and the writ of *mandamus* will not issue to place a party in an office after the expiration of the term to which he was elected.”

The term of office to which plaintiff claims to have been elected on the sixth day of November, 1888, would have ended in the usual course of events on the seventh day of the next January. No fact is shown which would have entitled him to remain in office after the

Potts v. Tuttle.

last-named date. It does not appear that any one was declared elected to fill the vacancy. The demurrer was filed on the twenty-second day of January, 1889, and was sustained on the ninth day of the next month. The question presented by the record for our determination is whether a peremptory writ of *mandamus* will issue to compel a canvassing board to reassemble and canvass the return of votes for an office, and to declare the candidate who received a majority of the votes cast therefor to be elected thereto, after the expiration of the term for which he was elected. We are of the opinion that where there is no right shown to relief, which cannot be granted in the ordinary course of the law, the answer must be in the negative. While it is not shown that plaintiff would be entitled to relief in an ordinary proceeding at law, it does not appear that the relief he demands in this action would result in any substantial benefit. It would not give him the office to which he claims title, for the reason that the term is ended. It would not give him any of the emoluments of the office. We said in *Chicago, R. I. & P. Ry. Co. v. Dey*, 76 Iowa, 278, that we would not settle questions which were involved in rights no longer existing. In *State v. Porter*, 58 Iowa, 19, this court said it would not determine mere abstract questions, and affirmed the order of the lower court, dismissing an action of *quo warranto* because the term of office in controversy had expired, and neither party had anything but costs to gain or lose by further litigation. In this case it appears that the writ demanded would have no practical effect. Therefore it should not be issued. In further support of the conclusions we have reached, see *Moses Mand.* 88; *Wood, Mand.* 18; *Gormley v. Day*, 114 Ill. 185; *Woodbury v. Commissioners*, 40 Me. 306; *Williams v. Commissioners*, 35 Me. 346; *People v. Tremain*, 17 How. Pr. 142; *People v. Supervisors*, 15 Barb. 617. The judgment of the district court is

AFFIRMED.

FLEMING V. STEARNS *et al.*

79	256
90	125
79	256
91	600
79	256
92	56
79	256
95	335
79	256
102	55
79	256
105	143
79	256
106	79
79	256
107	129
79	256
109	21

1. **Appeal: BILL OF EXCEPTIONS: WHAT SUFFICIENT: REPORTER'S NOTES.** Where the short-hand reporter's notes in a law action are ordered to be made a part of the record, and they are duly certified by the judge, on the day of the verdict, as containing all the evidence offered or introduced, and all the objections and rulings made and exceptions taken, this constitutes a sufficient bill of exceptions; and it is immaterial that the translation of the notes is not filed within the time allowed for taking an appeal. (See opinion for citations.)
2. **Sale: PARTNERSHIP: EVIDENCE: ADMISSIONS.** In an action against defendants jointly, though not as partners, when one of them claimed to have had nothing to do with the purchase declared on, evidence was properly admitted to the effect that he had stated in plaintiff's presence that he and the other defendant were partners in the business for which the purchase was made; also evidence that he had made similar admissions when plaintiff was not present.
3. **Instruction: STATING ISSUES.** The court instructed: "You will observe that the defendants do not deny that the plaintiff did sell the number of brick claimed, and at the price claimed." Defendants did not in their answer admit the price, but there was no controversy on the trial, and no conflict in the evidence, in regard to the price. *Held* that, as applied to the entire case, the instruction was correct.
4. **Appeal: REVERSAL: NOMINAL DAMAGES.** This court will not reverse a judgment on the ground that mere nominal damages were not allowed the appellant.
5. **Pleading: CLERICAL ERROR: CURED BY OTHER AVERMENTS.** Where the petition alleged that there was due from defendants to plaintiff a certain sum, with interest from October 1, 1888, but the other averments, and the evidence, showed that the property, the price of which was sought to be recovered, was sold and delivered about October 1, 1883, and the prayer of the petition asked for interest from that date, the date first named was properly discarded as a clerical error, and a verdict and judgment rendered in accord with the prayer of the petition.

Appeal from Polk District Court. — HON. JOSIAH GIVEN, Judge.

FILED, FEBRUARY 1, 1890.

ACTION to recover an amount alleged to be due for brick sold and delivered. There was a trial by jury and a verdict and judgment for plaintiff. The defendants appeal.

Henry S. Wilcox, for appellants.

Thos. W. Cheshire, for appellee.

ROBINSON, J.—The petition alleges that on or about the sixteenth day of October, 1883, the plaintiff sold and delivered to defendants forty-eight thousand, six hundred and forty-eight brick, for the agreed price of \$6.75 per thousand, and that the amount for which they were sold is due and unpaid. The petition also alleges that the debt is due for property obtained under false pretenses, and demands a writ of attachment, which was issued.

Defendant D. N. Stearns denies the allegation of the petition, excepting he admits that he purchased of plaintiff, during the year 1883, as many brick as are charged for in the petition, but alleges that he has fully paid for them. Defendant William Stearns admits that his co-defendant purchased of plaintiff the brick mentioned in the petition, but denies having had anything to do with the purchase, and denies all other allegations of the petition. By way of counter-claim he alleges that the writ of attachment was wilfully and maliciously sued out and levied upon a judgment for the sum of three hundred and fifty-five dollars, which was due him. He demands judgment for actual and exemplary damages, for a reasonable attorney's fee, and for costs.

In reply to the answer of William Stearns, plaintiff alleges that said defendant is estopped from denying liability for the brick in controversy, for that a short time before they were sold and delivered he represented that he and his father, his co-defendant, were partners, and desired to buy brick of plaintiff during the building season of 1883, and that plaintiff believed and

Fleming v. Stearns.

relied upon said representations in making the sale. Plaintiff also alleges that he consulted and relied upon the advice of counsel in suing out the writ of attachment. The verdict was against both defendants for the full amount of plaintiff's claim, with interest thereon at six per cent. from October 16, 1883, and against William Stearns on his counter-claim. Judgment was rendered in harmony with the verdict.

I. Appellee has filed a motion to strike the evidence from appellant's abstract on the ground that the abstract fails to show that the evidence

1. **APPEAL:** bill
of exceptions:
what suffi-
cient : report-
er's notes.

was preserved by bill of exceptions. In response to that motion appellant has filed a transcript. It appears from the record as it is now presented to us that the evidence and all proceedings had on the trial were duly reported by the official short-hand reporter; that the verdict was returned on the twenty-fifth day of May, 1888; that on the same day the judge before whom the cause was tried attached to the reporter's short-hand notes a certificate as follows: "I hereby certify that the foregoing is the official report of the above-entitled case; that it contains, together with the documentary evidence therein referred to, all of the evidence that was offered or introduced on the trial of said cause, and all of the objections and rulings made and exceptions taken; and the said official report in short-hand is hereby made part of the record in the above entitled cause." We omit the formal parts of the certificate and the signature. No objection is made to the form of the certificate. The report in short-hand so certified was duly filed in the office of the clerk of the district court on the twenty-sixth day of May, 1888. The motion for a new trial was filed two days later, and on the second day of June, 1888, the motion was overruled, and judgment was rendered. A translation of the short-hand notes was certified by the short-hand reporter in due form on the first day of September, 1888, and on the twenty-sixth day of January, 1889, was filed in the office of the clerk of the district court. It is claimed

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by appellee that, as the district court made no order extending the time for filing a bill of exceptions, the translation of the short-hand notes was filed too late to answer the requirements of the statute, if it were otherwise sufficient, and that the report in short-hand could not in any event take the place of a bill of exceptions. No formal bill of exceptions is required. If a judge attach to the evidence his certificate that it is all that was offered and received on the trial, it is a sufficient compliance with the statute as to the matter certified, in actions at law. *McCarthy v. Watrous*, 69 Iowa, 262, and cases therein cited. See also *Hurlburt v. Fyock*, 73 Iowa, 478; *Hunter v. Railway Co.*, 76 Iowa, 490. It was held in *Ross v. Loomis*, 64 Iowa, 433, that where the short-hand report is ordered to be made a part of the record, and a certificate of the judge in due form is attached, the evidence is sufficiently preserved. Following that case, and the others cited, we must hold that the short-hand report in this case, with the certificate of the judge, constitute a bill of exceptions within the requirements of the statute. Since this is an action at law, the fact that the translation of the report was filed more than six months after the original report was filed and judgment was rendered is not a fatal objection. *Hammond v. Wolf*, 78 Iowa, 227. The motion to strike will be overruled.

II. Appellants complain of the action of the court in permitting plaintiff to introduce in evidence portions of an affidavit filed in support of a motion for a continuance. Appellants had admitted that if the witness named in the affidavit (one Gibson) were present, he would testify as claimed in the affidavit. The affidavit alleged that in the spring of 1883 Gibson heard defendant William Stearns tell plaintiff that defendants were associated together in business, and were equally interested in purchasing brick and constructing buildings, and were partners. That portion of the affidavit is objected to, on the ground that no partnership is pleaded. That is true, but the petition charges the sale and delivery of brick

2. SALE: partnership: evidence: admissions.

Fleming v. Stearns.

to defendants, and that they orally agreed before the delivery thereof to pay the price named. If defendants were partners in the business for which the brick were procured, the promise of one would bind both, and the evidence in question tended to show that they were. It was therefore properly admitted. The affidavit also alleged that at a time when plaintiff was not present Gibson heard William Stearns make similar declarations. Appellant complains of the introduction of that part of the affidavit, on the ground that it could not form the basis of an estoppel; but the declarations charged were in the nature of admissions which tended to show that defendants were in fact bound jointly by the contracts in the line of their business made by one of them, and were therefore competent.

III. Appellant complains of the refusal of the court to permit a witness to answer the question, "What was the character of the brick furnished, as far as any portion not being acceptable?" The pleadings presented no issue to which the question could have referred, and the answer thereto was therefore properly excluded.

IV. Plaintiff claimed that, in collecting money of defendants for brick sold, he delivered to them certain tickets which showed where the brick went, the name of the transfer which hauled them, the number hauled, and time of delivery, and that defendants claimed it was their custom to take them. A witness was called for plaintiff who testified that when defendants settled for brick they generally took up the tickets. In admitting that testimony there was no error. D. N. Stearns had testified that he did not take up tickets on settlement. The evidence admitted tended to contradict that testimony, and to corroborate the claim of plaintiff as to the alleged custom of defendant.

V. The court charged the jury as follows: "You observe that the defendants do not deny but that the plaintiff did sell the number of brick
3. INSTRUCTION:
stating issues. claimed, and at the price claimed, to the defendant D. N. Stearns; hence the plaintiff will be

Fleming v. Stearns.

entitled to recover therefor from him, unless D. N. Stearns has proven his defense of payment." Neither answer admits the price alleged, and both, in legal effect, deny it. But there was no controversy as to the price on the trial, and no conflict in the evidence in regard to it. Therefore, as applied to the entire case, the instruction in regard to price was correct. The answer of D. N. Stearns does not admit the purchase of the specific brick claimed for, but admits the purchase of an equal number, and pleads payment. We do not find any claim in the evidence that the brick in question were not received, while plaintiff's claim, that they were delivered, seems to be corroborated by defendants. Therefore no prejudice could have resulted from the giving of that portion of the charge under consideration.

VI. Appellants contend that the evidence is not sufficient to authorize a judgment against William Stearns. It would serve no good purpose to set the evidence out at length, but it is sufficient to say that in our opinion it fully supports the verdict as to the liability of said defendant for the brick. It is said the evidence shows affirmatively that the ground on which the attachment was sued out was false, and that William should have recovered on his counter-claim. The evidence tends to show that the suing out of the writ was not malicious, and that the actual damage it caused, if any, was merely nominal. We should not be justified in disturbing the judgment on the ground that nominal damages were not allowed.

VII. It is claimed that the verdict of the jury is excessive. The petition alleges that there is due from the defendants to plaintiff the sum of \$328.37, "with interest at six per cent. from the sixteenth day of October, 1888." But it also shows that the brick were sold and delivered on or about the sixteenth day of October, 1883, and demands judgment for their price, with

4. APPEAL: reversal: nominal damages.

5. PLEADING: clerical error: cured by other averments.

Phelps v. James.

interest at six per cent. "from the sixteenth day of October, 1883." The evidence shows that the brick were in fact sold and delivered on or about that date. It therefore appears that the allegation that interest was due from October 16, 1888, was a mere clerical error, which, under the averments of the petition and the prayer for judgment, was wholly immaterial, and it was properly so treated by the court and jury. We discover no error in the case prejudicial to appellants. The judgment of the district court is therefore

AFFIRMED.

PHELPS *et al.* v. JAMES *et al.*

79	262
86	399
79	262
113	487
79	262
115	529

1. **False Representations: INSTRUCTIONS.** In an action for false representations, the court instructed the jury that if they found that defendants made false representations to the effect complained of * * * their verdict should be for plaintiffs. *Held* not erroneous on the ground that it was not limited to the representations testified to by plaintiffs.
2. ———: **EXCHANGE OF LANDS: CONTRACT.** Plaintiffs and defendants exchanged lands under a written contract containing stipulation that the exchange was made without regard to the valuation of the lands. *Held* that if this provision bound the parties to take the lands as they were, regardless of what they were represented to be, still either party would be liable to the other for false and fraudulent representations with regard to the value and character of the lands conveyed by him, which induced the other to enter into the contract.
3. ———: **INSTRUCTIONS: QUESTION FOR JURY.** In such case the court instructed: "If the defendants * * * did not know the condition of said land, it was their duty to remain silent, and it would be a false representation if said defendants delivered said so-called guaranty as a true description of said land, even though they did not in fact know said description to be false." *Held* erroneous, in that it alleged as a matter of fact that the representations by means of a guaranty given in evidence were false,—that being a question for the jury.
4. ———: ———: **KNOWLEDGE OF FALSITY.** To render one liable for false representations, not only the falsity of the representations, but his knowledge thereof, must be proved, and instructions given in this case were erroneous for holding otherwise. (See opinion for citations.)

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Appeal from Polk District Court.—HON. MARCUS KAVANAGH, JR., Judge.

FILED, FEBRUARY 1, 1890.

ACTION to recover for false and fraudulent representations made by defendants' agents as to the character, condition and value of a tract of land, whereby plaintiffs were induced to enter into a contract for the exchange of other real property for it. There was a judgment upon a verdict for plaintiffs. Defendants appeal.

Bousquet & Earle, for appellants.

Reed & Reed and *McGarry & Brown*, for appellees.

BECK, J.—I. The plaintiffs and defendants entered into a contract for the exchange of real estate; the property exchanged by plaintiffs being a farm in Lee county, and that exchanged by defendants a hotel in Indianola. The contract was made for both parties by agents. The false and fraudulent representations which it is alleged induced plaintiffs to make the contract, related to the quality of the land, its improvements, rental value, etc. In one count of the petition recovery is sought upon a written guaranty as to the location, condition, quality, improvements, etc., of the land. The parties entered into a written contract specifying the terms of the trade, the description of each piece of property, the incumbrances thereon, obligations to furnish abstracts of title, and to make warranty deeds for the property and other terms not necessary to be here stated. The contract contains a condition in these words: "The above is an exchange of said property without regard to valuation of said property or either of them."

II. The first instruction directs the jury that if they find defendants, by themselves or agents, made

Phelps v. James.

1. FALSE repre-
sentations:
instructions.

false representations to the effect complained of, knowing them to be false, upon which plaintiffs relied, and were thereby induced to enter into the contract, their verdict should be for plaintiffs. . It is insisted that the instruction is erroneous for the reason that it refers to representations generally, and not those testified to by plaintiffs. The court rightly made the language of the instruction general, so that it would be applicable to any representations which are covered by the allegations of the petition.

III. It is insisted that this instruction is, and others are, erroneous, in that they hold defendants liable for false representations which induced defendants to execute the contract for an exchange of the lands. Counsel for defendants, as we understand them, insist that, under the condition of the contract above quoted, the trade was made without regard to the value of the lands, their condition, improvements, etc., and both parties are precluded thereby from complaining if the lands prove not to be as represented by the parties in their negotiations and contract. But if it be admitted that the condition of the contract is such that the parties are bound to take the lands as they are and not as they were represented to be, yet it cannot be doubted that the defendants are liable for false representations which induced plaintiffs to enter into the contract for the exchange of lands. If plaintiffs by the false and fraudulent representations were induced to enter into that contract, relying upon defendants' representations as to the lands, surely they will be liable for thus inducing plaintiffs to enter into a contract under which they are cut off from urging, as a defense to the enforcement of the contract, such false and fraudulent representations. And defendants are liable if the plaintiffs by the false and fraudulent representations were induced to enter into the contract which by its terms prescribes that plaintiffs shall not object to the quality, condition or value of the land, and urge such objections against the enforcement of the contract.

2. —: ex-
change of
lands: con-
tract.

Phelps v. James.

IV. The district court directed the jury in the following language: "If the defendants or their agents did not know the condition of said land, it was their duty to remain silent, and it would be a false representation if said defendants delivered said so-called guaranty as a true description of said land, even though they did not in fact know said description to be false." This instruction is apparently erroneous in that it alleges as a matter of fact that the representations of defendants by means of a guaranty, given in evidence, were false. The jury would not fail to understand the plain language of the instruction as so directing them. It is scarcely necessary to observe that whether the representations were false was a matter of fact to be determined by the jury.

3. —: instructions: question for jury.

V. The instruction errs in holding that defendants are liable for false representations, even though they did not know the representations to be false. The rule is that to render one liable for false representations the falsity of the representations and his knowledge thereof must be established by proof. *Allison v. Jack*, 76 Iowa, 205; *McGrew v. Forsythe*, 31 Iowa, 181; *Hallam v. Todhunter*, 24 Iowa, 166; *Mitchell v. Moore & Moore*, 24 Iowa, 394.

4. —: —: knowledge of falsity.

Another instruction, the fifth, erred in omitting to direct the jury that, to render defendants liable for false representations, the representations should have been known to them to be false.

VI. Counsel for defendants contend that the errors in these instructions are without prejudice for the reason that the knowledge of plaintiffs was shown by the evidence. There was evidence tending in that direction but it cannot be said that the fact was established beyond question. It was the right of defendants to have the question submitted to the jury for determination.

Other questions in the case need not be considered as they may not arise upon another trial. For the errors above pointed out, the judgment of the district court is

REVERSED.

79	266
84	197

BENSLEY V. THE CHICAGO AND NORTHWESTERN RAIL-
WAY COMPANY.

Appeal: JURISDICTION: CERTIFICATE: QUESTIONS OF LAW ONLY.

Section 3173 of the Code, giving this court jurisdiction of appeals involving less than one hundred dollars, only when questions of law are certified by the trial judge, contemplates that each question certified shall present a question of law, in intelligible language, distinct from other questions of law or fact; and the certification of questions of fact, or of questions involving questions of fact, does not give jurisdiction. So, in this case, where seven questions were certified, and the first two related to the weight of the evidence, and the third and fourth to the correctness of instructions given and refused, and the fifth to the sufficiency of the evidence to sustain the verdict, and the sixth and seventh to the question whether the verdict was in accord with the law and the instructions, *held* that they all involved a consideration of the evidence, *i. e.*, questions of fact, and that the certificate did not confer jurisdiction. (See opinion for citations.)

Appeal from Crawford District Court.—HON. J. P.
CONNER, Judge.

FILED, FEBRUARY 1, 1890.

ACTION to recover eighty dollars and interest, the value of seven hogs, shipped upon defendant's road, which died for want of proper care by defendant. There was a verdict and judgment for plaintiff. Defendant appeals.

Hubbard & Dawley and T. J. Garrison, for appellant.

D. L. Boynton, for appellee.

BECK, J.—I. The amount in controversy being less than one hundred dollars, the case is brought here upon a certificate intended to be in compliance with Code, section 3173. In order to point out defects in the certificate, it becomes necessary to present it in full. It is

Bensley v. The Chicago & N. W. Ry. Co.

in the following language: "I, J. P. CONNER, the trial judge of said court, before whom the above cause was tried, hereby certify that said cause involves the determination of the following questions of law, upon which it is desirable to have the opinion of the supreme court, viz.: (1) The evidence showed that plaintiff shipped a carload of hogs from Vail to Chicago on defendant's railway, and that when said car reached its destination a tramp was found asleep in one end of the car, and the hogs were crowded away from said end for a space of six or seven feet. There was no evidence tending to show how long the tramp had been in the car. There was no evidence that any of defendant's employes knew the tramp was on the train until after the car reached its destination; and there was evidence tending to show that the men in charge of the train did not know the tramp was on the train until after the car reached its destination. The car doors were sealed with thin strips of tin, which would not prevent any one from opening the door, if he wanted to. The small door in the upper part of the east end of the car was found open at the time the tramp was discovered, and was open when the train left Clinton. At the time the car reached its destination, seven of the hogs were found dead. The conductor and brakeman testified, and without contradiction, that they kept their usual lookout for tramps; that that was their duty; that they passed along this car about an hour before it reached its destination; and did not notice any tramp then, or anything wrong; and that they thought they would have noticed it, if he had been there. It was shown without conflict that it is not usual to lock the doors of stock-cars, except with said strips of tin, which are easily broken. It was also shown without dispute that not a train of hogs goes into Chicago without more or less dead ones, caused by the hogs crowding each other from natural causes, and without any one having been in the car to crowd them up. There was no evidence, other than above stated, tending to show that the tramp was in the car by reason of negligence of defendant's employes, or that the hogs died

Bensley v. The Chicago & N. W. Ry. Co.

by reason of the tramp being there. The plaintiff alleged that the hogs were killed by reason of the negligence of defendant in permitting said tramp to ride in said car; and the court ruled that the burden of proof was on the plaintiff to establish that the hogs died by reason of negligence, as alleged. Did the court err in holding, by its rulings on defendant's motions to instruct the jury, that there was any evidence to submit to the jury that the tramp was in the car through negligence of defendant? (2) Did the court err in holding that there was any evidence to submit to the jury that the damage was caused by the tramp being in the car? (3) Did the court err in refusing to instruct the jury that the defendant was not bound to explain how or why the tramp got into the car, or why the hogs died, in order to avoid liability? (4) Did the court err in refusing the following instruction asked by defendant. '*Eighth*. If you are unable to find from the evidence whether said hogs died by reason of their own restlessness, and crowding one another, or by reason of being crowded by said tramp, then your verdict should be for the defendant?' (5) Did the court err in refusing to set aside the verdict on the ground that it was not supported by sufficient evidence? (6) Did the court err in refusing to set aside the verdict on the ground that it was contrary to law? (7) Did the court err in refusing to set aside the verdict on the ground that it was contrary to the instructions given numbered 6, 7 and 10?"

II. It is obvious that the first, second, fifth, sixth and seventh questions do not present questions of law, for our determination, but rather present questions as to the weight and effect of evidence. The reading of these questions is all that is necessary to establish this position. See *Hudson v. Railway Co.*, 59 Iowa, 581. A little thought will disclose the fact that questions six and seven call for the consideration and weighing of evidence. The seventh question is not sufficient, for another reason: It states no question of law, but refers

Devin v. Eagleson.

to three instructions, and presents three questions in one. All these questions require the consideration of evidence, in order to determine whether the facts proved accord with the rules of the instructions. They are therefore questions of fact. It is scarcely necessary to remark that the statute requires questions of law, not questions of fact, to be certified in cases of this character.

III. The third and fourth questions also involve matters of fact. To point out the defect in these questions, they must be considered in a view different from that applicable to the other questions. It will be remembered that in order to determine whether an instruction was rightly refused the evidence must be considered, to ascertain whether the instruction is applicable thereto. It must be determined what facts the evidence tends to prove. Other matters, as the pleadings and the issues, must be considered. These questions involve facts as well as law; and each one may present more than one question, either of law or fact,—possibly, a score of such questions. The statute contemplates that each question certified shall present a question of law, in intelligible language, distinct from other questions of law and fact. In this regard, all of the questions certified fail. As the case is not lawfully certified here, we have no jurisdiction thereof. *Kierulff v. Adams*, 40 Iowa, 31; *Beeler v. Garrett*, 76 Iowa, 231. The appeal will be

DISMISSED.

DEVIN *et al.* v. EAGLESON *et al.*

1. **Statute of Frauds: AGREEMENT TO MORTGAGE LAND FOR PURCHASE MONEY: VENDOR'S LIEN.** Where land had been purchased and partly paid for, and had passed into the possession of the purchaser, under an agreement that he would, as soon as possible, execute a mortgage thereon to the vendor to secure the residue of the purchase price, the agreement to execute the mortgage is excepted from the statute of frauds by section 8665 of the Code.

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2. **Vendor's Lien: AGREEMENT TO EXECUTE MORTGAGE.** Where a purchaser of land paid a part of the price and took possession, and agreed to execute a mortgage for the residue, and the mortgage which was prepared, and which he was to execute, but which he never did execute, provided that he should keep the taxes paid, and he failed to pay them, and the vendor paid them to preserve his security, *held* that the vendor had a lien, according to the terms of the prepared mortgage, not only for the residue of the purchase price, but also for the taxes paid by him.
3. ——— : ——— : **JUDGMENT CREDITORS: PRIORITY.** In such case, where merchants extended credit to the purchaser after the purchase, but before his deed was recorded, but they did so not knowing of nor relying upon his purchase of the land, and, after the deed was recorded, they procured a judgment against him, which became a lien on the land, *held* that such lien was inferior to the vendor's lien, for purchase money and taxes.
4. ——— : ——— : **EXTINGUISHMENT BY VENDEE'S INSOLVENCY AND ASSIGNMENT.** The vendor's lien in such case, not being a mere equity, but based upon a contract which a court of equity will enforce, is not extinguished by the insolvency of the vendee, and his assignment. Code, section 1940, which provides that no vendor's lien for unpaid purchase money shall be valid after a conveyance by the vendee, unless reserved by a proper instrument in writing, duly acknowledged and recorded, does not apply to a lien thus created by contract. (See opinion for citations.)
5. **Bankruptcy: ENFORCING LIEN AGAINST BANKRUPT'S PROPERTY: LIMITATION.** Section 5057 of the Revised Statutes of the United States, providing that no suit shall be maintained in any court between the assignee in bankruptcy and the person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee, does not apply to an action between a vendor to the bankrupt and a judgment creditor, involving the priority of their liens, both of which antedated the assignment, and where the property in question had, by order of court, been conveyed by the assignee to the vendor in satisfaction of his demand.
6. **Equity: RELIEF: LACHES.** A party in possession of land cannot be charged with laches in neglecting to bring an action to establish his rights therein, so long as those rights are not questioned.

Appeal from Greene District Court.—HON. J. P. CONNER, Judge.

FILED, FEBRUARY 1, 1890.

ON August 24, 1877, the plaintiff Devin was the owner of lot number 177, block 23, in the town of Jefferson, Greene county, Iowa, and on that day he conveyed the same to the defendant J. A. Thompson, in pursuance of a verbal agreement by which Thompson was to pay twelve hundred dollars for the lot, one hundred dollars of which he then paid in cash, and for the balance executed and delivered to Devin his seven promissory notes. The first three notes falling due, and the interest on the others up to January 1, 1878, were paid by Thompson; leaving four notes, of two hundred dollars each, with interest at ten per cent., due, respectively, January 1, 1879, 1880, 1881 and 1882, unpaid. In each of the notes was written: "This note is given in part payment for, and secured by a mortgage on, lot number 177, in Jefferson, Iowa." The deed to Thompson was recorded March 13, 1878. On July 19, 1878, Thompson confessed judgment in favor of defendants T. W. Barhydt & Co., in the district court of Guthrie county, Iowa, on account for merchandise, for \$359.55, a transcript of which judgment was filed in the office of the clerk of Greene county, July 20, 1878. The bills of merchandise in the account upon which judgment was rendered were delivered in August and November, 1877. In July, 1886, an execution was issued on said judgment, and placed in the hands of the defendant Eagleson, sheriff of Greene county, who levied the same upon said lot, and was proceeding to sell the lot under said execution, until enjoined in this action. In September, 1878, Thompson was, upon his own petition, adjudged a bankrupt, and Dan Brown appointed assignee. The assignee filed his petition in the United States district court, alleging that Thompson held said lot subject to a mortgage lien for the full value thereof, and that the holder, desiring to quiet his title and secure possession, was willing to release the estate, and to purchase the interest of Thompson in the lot, for the debt due. On April 4, 1883, that court ordered the assignee to convey the interest of Thompson in the

Devin v. Eagleson.

lot to Devin, on said terms; and on April 6, 1883, the assignee executed a conveyance accordingly to Devin, and Devin surrendered to him said unpaid notes. Thereafter the plaintiff sold and conveyed said lot for full value to the plaintiff Albert Head. The plaintiff Devin claims that, as a part of the oral agreement under which he conveyed said lot to Thompson, and received the one hundred dollars in cash and the seven promissory notes, Thompson promised and agreed that he and his wife would execute to Devin a mortgage on said lot to secure the seven promissory notes, and when executed he would send the same to Mahlon Head, who, as agent for Devin, was to receive and file the same for record, and that a mortgage, ready for execution, was then given to said Thompson, to be executed and sent to Mahlon Head, as agreed upon. Thompson and the other defendants deny that there was any agreement to give a mortgage on said lot to secure said notes. Decree was entered in the district court, finding and establishing the lien of plaintiff Devin for twenty-one hundred and sixteen dollars, with ten per cent. interest from date of decree, and for \$133.12 taxes paid, with six per cent. interest from date of decree, and declaring the same to be superior and paramount to the lien of the defendants Barhydt & Co. It was ordered and adjudged that the plaintiff Albert Head be subrogated to all the rights and equities of his co-plaintiff G. W. Devin; that the injunction be dissolved; that the defendants Barhydt & Co., may, if they so elect, cause said lot to be sold under their judgment against Thompson; the sale to be subject to said lien in favor of plaintiffs for said amount found due. The defendants Eagleson and Barhydt & Co. appeal.

H. E. Long, for appellants.

Russell & Toliver and *Mitchell & Dudley*, for appellees.

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GIVEN, J.—I. Our first inquiry is whether at the time of the sale, and as a part thereof, it was agreed that Thompson should execute to Devin a mortgage on the lot to secure the seven promissory notes. We are entirely convinced that such was the agreement. Devin, Mahlon Head and Albert Head each so testified, and they are corroborated by the facts that Devin and Thompson were strangers; that Devin had been informed by Mahlon Head that he did not understand that Thompson was worth a great deal of money; that credit was extended for the greater part of the purchase price, and on long time; and that Thompson was in possession of the very mortgage which Devin says he filled out and gave to him to be executed and sent to Mahlon Head for record. The language of the notes indicates such an agreement. The unsupported denial of Thompson cannot prevail against this weight of testimony.

II. Appellants contend that, as a mortgage on real estate is an instrument affecting the title thereof, or conveying an interest therein, it must be in writing, and, if not, that it comes within the statute of frauds, and cannot be proved, and hence that an agreement for such a mortgage, unless in writing, comes within the statute, and is invalid. The general provision of the statute is that no evidence of contracts for the creation or transfer of any interest in lands, except leases for a term not exceeding one year, is competent, unless it be in writing, and signed by the party charged, or by his lawfully authorized agent. To this general provision there is the exception that it shall not “apply where the purchase money, or any portion thereof, has been received by the vendor, or when the vendee, with the actual or implied consent of the vendor, has taken and held possession thereof under and by virtue of the contract, or when there is any other circumstance, which, by the law heretofore in force, could have

1. STATUTE of
frauds:
agreement to
mortgage
land for pur-
chase money:
vendor's lien.

Devin v. Eagleson.

taken the case out of the statute of frauds." Code, secs. 3663-3665. Clearly, the consideration for which Thompson was to give the mortgage had been received by him. There was such a part performance of the agreement as takes it out of the statute of frauds, and renders it enforceable by courts of equity.

III. "The term 'purchase money,' as used in this statute, means the consideration." *Devin v.*

Himer, 29 Iowa, 298. The consideration for Thompson's promise to give a mortgage was the sale and conveyance of the lot to him, which consideration he fully received.

That such a part performance will take the case out of the statute of frauds is so well established as not to require citation of authorities. It would be grossly inequitable to leave Thompson to enjoy the fruits of the oral agreement, and deny to Devin what was promised to him in consideration therefor. The numerous authorities cited by counsel for appellants, relating to equitable mortgages by deposit of title deeds, are not applicable to a case where there has been an oral agreement to give a mortgage, that has been so far performed as to bring the case within the exception to the general statute. The agreement was to execute the mortgage prepared by Devin, in which it is provided that Thompson shall pay accruing taxes. This he failed to do, and Devin paid them to preserve his security. We are clearly of the opinion that, as between Devin and Thompson, Devin is entitled to a lien, according to the terms of the mortgage prepared, and which Thompson agreed to execute, for the unpaid purchase money and interest, and for the taxes paid by Devin on the lot.

IV. It is contended, on behalf of appellants Barhydt & Co., that, though such a lien may exist as between Thompson and Devin, it is of no validity as to them; they having extended credit to Thompson on the faith of his property, and without any knowledge of such a lien. It is unquestionably true that they had no

2. VENDOR'S
lien: agree-
ment to exe-
cute mort-
gage.

3. —: —:
judgment
creditors:
priority.

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knowledge of this lien at the time they gave credit to Thompson, and we think it also true that they did not then know that Thompson had or claimed any interest in the lot in question. Both members of the firm were witnesses, and neither testified to having any knowledge of this lot, or that Thompson had any interest in it at the time they gave credit to him. The deed to Thompson was not filed for record until long after the date of the last item in the account upon which judgment was confessed. It is evident that they did not extend that credit to Thompson because of any interest he had in the lot.

The case of *Hulett v. Whipple*, 58 Barb. 224, relied upon by appellants, is identical with this in many of its facts, yet differing in several important particulars. In that case, at the time of the conveyance and delivery of the notes, the purchaser promised that he would give security "at any time thereafter, or would at any time thereafter give him security on the land;" thus leaving it with the vendor to demand security when he desired it. No demand was made, and hence the vendor was held to have waived the security. In this case, the security was to be given as soon as Thompson could go to his home, and have his wife join in the mortgage. There was nothing remaining for Devin to do to entitle him to the mortgage. In that case, as in this, defendants, without knowledge of the unrecorded lien, gave credit, but, unlike this, did so after an examination of the records, and upon the faith of the vendee's apparent, unincumbered, record title. In that case, as in this, the vendor prepared the deed, but he did not prepare a mortgage to be given, as Devin did; in that, the vendor received the money and notes without requiring or demanding a mortgage,—“he consented to take Cressey's notes, and let him go.” With no right to expect a mortgage until demanded, he waited two years and nine months without making his claim known. Devin waited, supposing his mortgage had been executed, and sent to Mr. Head, and was upon

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record. The court says in that case: "It may be laid down as a sound rule of equity that a judgment creditor who advances his money on the faith of unincumbered title upon the record, without notice, is entitled to the lien acquired thereby, in preference to the secret unrecorded lien of the vendor for a part of the purchase money." This case is not within that rule, because credit was not given to Thompson upon the faith of his title.

V. Appellants contend that, at most, Devin has but a mere vendor's lien, and that this became extinguished by the conveyance from Thompson to Brown, assignee, under the provisions of section 1940, Code, which provides that "no vendor's lien for unpaid purchase money shall be recognized or enforced, in any court of law or equity, after a conveyance by the vendee, unless such lien is reserved by conveyance, mortgage or other instrument, duly acknowledged and recorded." It was held in *Prouty v. Clark*, 73 Iowa, 55, that an assignment by an insolvent was a conveyance, within the meaning of this section. In *Porter v. City of Dubuque*, 20 Iowa, 442, it is said: "The right to a lien in favor of a vendor upon the real estate sold to a vendee is not based upon contract, nor is it properly an equitable mortgage; neither can it be regarded as a trust resulting to the vendor by reason of the vendee holding the estate with the purchase money unpaid. It is a simple equity, raised and administered by courts of chancery." Devin's lien is not such a lien. It is not a simple equity, but a lien based upon a contract,—a contract, as we have seen, such as courts of equity will enforce. Hence section 1940 does not apply. The assignee takes the property of his assignor subject to all the equities existing against it in favor of third parties. He stands in the shoes, and succeeds only to the rights, of the assignor. *Roberts v. Corbin*, 26 Iowa, 316. Counsel claim, on the authority of *Cutler v. Ammon*, 65 Iowa, 281, that defendants' judgment is entitled to priority.

4. —: —:
extinguish-
ment by
vendor's in-
solventcy and
assignment.

Devin v. Eagleson.

It was held in that case that the lien of a judgment takes precedence of a prior vendor's lien, but it does not hold that the judgment would take precedence over a lien created by contract.

VI. It is provided in section 5057, Revised Statutes, United States, that no suit shall be maintained in

5. BANKRUPTCY: any court between the assignee in bankruptcy and the person claiming an adverse interest, touching any property or rights of property, transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. Appellants contend that the plaintiff Devin's cause of action accrued when the first note fell due, January 1, 1879, and that, as defendants' action was not brought within two years thereafter, nor within two years after the last note fell due, January 1, 1882, the action is barred. *Goodnow v. Oakley*, 66 Iowa, 658, is relied upon. That was an action against the assignee to recover for taxes paid upon lands owned by the bankrupt, and to have the same declared a lien upon the land. Subsequent to the bringing of the action, the assignee conveyed the land to other persons, who, by proper amendments to the petition, were made defendants. It was held that the plaintiff came within the express language of the provision, as one claiming an adverse interest touching property, or rights of property, vested in such assignee. This case is distinguishable from that, in the fact that this conveyance was to the plaintiff, and that the assignee is not a party to this action. While it is true that, in a certain event, relief is asked against Thompson and wife, yet it is not a case wherein plaintiff is claiming an interest adverse to the assignee, touching property or rights of property vested in him. The real controversy is between Devin and Barhydt & Co., and not within the statute cited. We find nothing in any of the cases referred to in conflict with this view.

VII. Appellants' further contention is that plaintiffs are estopped by their laches from asserting their

Bolton v. Oberne, Hosick & Co.

6. **EQUITY:** lien. Having consummated his lien by
relief: laches. securing the conveyance of the assignee,
 there was no cause for action upon the part of Devin
 until he was disturbed by Barhydt & Co.'s execution,
 and, when this occurred, this action was brought. He
 is guilty of no laches.

VIII. It is also contended by appellants that Devin cannot recover taxes, because there was no agreement in writing entitling him to recover the same. The mortgage which Thompson agreed to and should have executed provides for the payment of taxes. Hence Devin's right to a lien for unpaid purchase money covers the taxes. Our conclusion is that the decree of the district court is right, and should in all respects be
AFFIRMED.

BOLTON V. OBERNE, HOSICK & CO.

Homestead: JOINT TENANCY: CONVEYANCE: VALIDITY: WHO MAY QUESTION: INNOCENT PURCHASER. The real estate in controversy was owned jointly by P. and his son, and was occupied by P., who was a married man, as his homestead. While so occupied P. and his son conveyed it to P.'s daughter, but P.'s wife did not join in the deed. After the death of both P. and his wife, the daughter conveyed to plaintiff. P.'s heirs always regarded these conveyances as valid. Prior to the conveyance to plaintiff, defendants procured a judgment against two of the sons of P. Plaintiff, when he took his conveyance, knew of this judgment, and also knew of the occupancy of the premises by P. as his homestead up to the time of his death. *Held—*

- (1) That, while P. was only a joint tenant, his occupancy of the premises as such gave him a homestead right therein. (See *Thorn v. Thorn*, 14 Iowa, 53; *Wertz v. Merritt*, 74 Iowa, 686.)
- (2) That the failure of P.'s wife to join in the deed to the daughter made the deed of no effect so far as P.'s undivided interest was concerned. (See Code, sec. 1990, and citations in opinion.)
- (3) That, though P.'s heirs did not question that conveyance, defendants had the right to do so, if they were interested as judgment lien-holders.

79	278
123	551
79	278
132	758

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- (4) That, since the conveyance was a nullity as to P.'s undivided interest, that interest descended, upon the death of his wife and himself, to his children, and defendant's judgment became a lien on the shares of the two sons who were judgment debtors, and they were sold on execution thereunder.
- (5) That plaintiff, with the knowledge he had when he purchased, could not claim priority over defendants on the ground that he was an innocent purchaser, under the rule of *Lunt v. Neeley*, 67 Iowa, 98.

Appeal from Polk District Court. — HON. JOSIAH GIVEN, Judge.

FILED, FEBRUARY 3, 1890.

ACTION in equity to quiet title. There was a trial on the merits, and a decree for plaintiff. The defendants appeal.

C. C. & C. L. Nourse, for appellants.

Conrad & Campbell and *Hugh Brennan*, for appellee.

ROBINSON, J.—The property in controversy is “the west sixty feet of lot 9, block 19, East Fort Des Moines, now included in the city of Des Moines.” In the year 1867, it was owned by B. F. Allen. At some time, not later than the year 1869, he contracted to sell it to Hazard Parks and his son T. J. Parks, and on the twenty-second day of October, 1878, a deed was executed in fulfillment of the contract by the assignee in bankruptcy of Allen. Hazard Parks was a married man, the head of a family, when the property was purchased; and he lived on and occupied it as a homestead from about the time of its purchase until his death, which occurred in April, 1883. While the premises were so occupied, and on the twenty-ninth day of October, 1878, Hazard and T. J. Parks executed a deed for them to “Leah Parks.” On the tenth day of August, 1885, a deed for the premises was executed, in

Bolton v. Oberne, Hosick & Co.

the name of Leah Parks, to plaintiff. In the year 1884, T. J. Parks and A. J. Parks, also a son of Hazard, were engaged in business, and contracted an indebtedness to defendants. On the thirtieth day of March, 1885, defendants recovered a judgment on said indebtedness against T. J. Parks and A. J. Parks, in the district court of Polk county, for \$259.16, besides interest and costs. An execution was issued to satisfy the judgment; and on the twenty-seventh day of November, 1885, the property in controversy was sold to defendants under the execution, and a certificate of sale was duly issued to them. The wife of Hazard Parks was named "Leah." She was the mother of T. J. and A. J. Parks, and died in September, 1881. Hazard and his wife, Leah, had several daughters, and among them one who was known to the neighbors of the family as "Lovilla," but whose full name, as appellee contends, was Leah Lovilla Parks.

I. Appellants insist that the property in controversy was a homestead, within the meaning of the law, when the deed of October 29, 1878, was executed; that it was made to the wife of Hazard; that upon her death it became the property of her husband and children, as she died intestate, and that upon the death of Hazard, intestate, the title to the premises became fully vested in their children, of whom seven are living. Appellants further contend that, if the grantee of the deed was in fact the daughter Lovilla, the deed was void as to the interest of Hazard, for the reason that it was his homestead, and his wife did not join in the conveyance. Therefore, that an undivided two-sevenths of an undivided one-half of the premises would be subject to the payment of their judgment. It is conceded that the premises were worth five thousand dollars when plaintiff obtained his conveyance from Leah Parks. So far as the record shows, the conveyance to Hazard and T. J. Parks constituted them tenants in common of the property conveyed. Code, sec. 1939. A homestead right in land owned by tenants

in common may be acquired by one of the co-tenants (*Thorn v. Thorn*, 14 Iowa, 53; *Wertz v. Merritt*, 74 Iowa, 686); and such right can be acquired in land held only by equitable title (*Hewitt v. Rankin*, 41 Iowa, 44). The evidence clearly shows that Hazard Parks had a homestead right in the premises when the deed of himself and son was executed to Leah Parks. We are also of the opinion that the grantee was the daughter, Leah Lovilla Parks. It is true, as claimed by appellants, that there is a strong showing to the contrary. The neighbors of the family knew the daughter only by the name "Lovilla," or "Villa." A lady who employed her for two years knew her only as "Lovilla;" and a brother-in-law knew her only as "Lovilla" or "Villa" during an acquaintance of nine years, and for two years after his marriage to one of her sisters. But T. J. Parks testifies positively that the conveyance was to his sister, and a sister named Anna testifies that Lovilla's name was "Leah Lovilla." Plaintiff, who knew the family many years, testifies to the same effect. As the mother's name was also Leah, it would not be unnatural to call the daughter by her other name. Certainly, the testimony of members of the family is entitled to greater weight than that of others who only knew the name commonly used. It being determined that the grantee was the daughter of Hazard Parks, his conveyance was invalid because of the homestead character of the premises and the failure of his wife to join in the deed.

This conclusion is not seriously questioned by appellee, but he insists that appellants are not in position to take advantage of the invalidity; that in justice and equity no one outside of the family or heirs can disturb the title or take advantage of the deed; that all the heirs have treated the conveyance as valid; and that no one else has a right to question it. The statute provides that such a conveyance is of no validity. Code, sec. 1990; *Alley v. Bay*, 9 Iowa, 509; *Barnett v. Mendenhall*, 42 Iowa, 296; *Belden v. Younger*, 76 Iowa,

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567. Therefore, any one interested in the property it attempted to convey may question it.

II. Appellee contends that he is an innocent purchaser, within the rule announced in *Lunt v. Neeley*, 67 Iowa, 98; but we think the evidence shows clearly that he had knowledge of such facts as charged him with notice of defendants' rights. He was well acquainted with the family of Hazard Parks, and had known them for many years. He knew they occupied the premises as a homestead. He knew when the father and mother died, and that there was an unsatisfied judgment against Parks Bros. in favor of defendants. In addition to the deed from Leah he required a quitclaim deed from all the other heirs, which described the property as their homestead. He is shown to have been fully advised as to all material facts upon which defendants rely, and is not entitled to protection as an innocent purchaser.

III. It appears that T. J. Parks and A. J. Parks together owned an undivided two-sevenths of an undivided one-half of the property in controversy when the judgment through which defendants claim was rendered, and that the judgment was a lien on the interest so owned. Therefore, the execution sale was effectual to convey the rights of the judgment debtors in the property subject to any right of redemption which may have existed paramount to the title of plaintiff. It follows that he is not entitled to the relief demanded. The decree of the district court is, therefore,

REVERSED.

BLACKMORE V. FAIRBANKS, MORSE & CO.

1. **Evidence: OBJECTION TOO LATE: NO PREJUDICE.** In an action for breach of warranty in the sale of machinery, plaintiff, in his examination in chief, stated that he had received from defendants a plan for setting it up, and in answer to the question, "was it erected according to that plan," he said "yes." Defendants then objected to the question on the ground that plaintiff should show the plan, and how the machinery was erected. *Held—*

79	282
86	547
79	282
89	466
79	282
92	314
79	282
96	37
99	647
101	664
79	282
105	546
79	282
1108	39
79	282
	184
	929

Blackmore v. Fairbanks, Morse & Co.

(1) That the objection to the question was too late after it had been answered.

(2) That, even if the objection were made in time, the ruling was without prejudice, since defendants made no attempt to show, by cross-examination or otherwise, that plaintiff had deviated from the plan.

2. ———: OBJECTION WITHOUT GROUND STATED. A court is not obliged to sustain an objection to evidence when no ground for the objection is stated, even though a sufficient ground exists.
3. ———: OBJECTIONS: ONLY STATED GROUNDS CONSIDERED. Where a party objects to evidence upon certain grounds which are not well taken, it is not error for the court to overrule the objection, though a good ground for the objection may exist.
4. ———: POWER OF ENGINE: COMPETENCY. Where the power of an engine with which plaintiff had tried to run his mill was material, it was competent for a witness who had been engaged in operating the mill to testify to its power as compared with that of three water-wheels, of known power, by which the mill had been run.
5. ———: OF AGENCY: WHEN NOT ADMISSIBLE. One who has contracted as a principal cannot, when sought to be held upon the contract, be permitted to show that he was only an agent, where he does not propose to show that the other party knew of such agency at the time of contracting.
6. Conspiracy: WHEN NOT ACTIONABLE: EVIDENCE. Defendants, by counter-claim, sought to recover of plaintiff for an alleged conspiracy with one W., whereby defendants were induced to ship property to Iowa for W., but which was consigned to defendants, the object of the conspiracy being to get property of the defendants within the jurisdiction of the courts of Iowa, that the plaintiff might attach it in this case, which he did. The order on which it was shipped provided that it was not to pass to W. until he paid for it upon delivery, and it never was paid for, nor delivered to any one. *Held* that, if there was a conspiracy as alleged, it did not operate to deprive defendants of their property, and that the court properly refused to require plaintiff to testify in regard thereto.
7. Sale: WARRANTY: WHEN IMPLIED BY LAW. Where plaintiff ordered machinery without inspecting it, and with no opportunity to do so, but defendants knew the use for which it was intended, the law will imply a warranty that the machinery was fit for the designed use, and that it was in merchantable condition, unless such warranty was excluded by the terms of the order; and the mere fact that the contract in such a case provided for certain warranties did not operate to exclude the warranties implied by law, unless such implied warranties were incompatible with the terms of the contract. (See opinion for citations.)

79	282
122	707
128	478

79	282
127	143
d127	468

Blackmore v. Fairbanks, Morse & Co.

Appeal from Butler District Court.—HON. JOHN C. SHERWIN, Judge.

FILED, FEBRUARY 3, 1890.

ACTION to recover damages alleged to have been sustained by reason of breach of warranty in the sale of machinery. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

Cummins & Wright, for appellant.

J. H. Scales, for appellee.

ROBINSON, J.—The agreement under which the machinery in controversy was sold was in writing and in the form of an order. The portions material to a determination of the questions raised on this appeal are as follows:

“*Messrs. Fairbanks, Morse & Co., Chicago*

“Please furnish me at once the following named goods: * * * One twenty-five-horse power Standard Westinghouse engine; one thirty-horse power boiler, with fixtures complete, and machines as follows: One steam pump, with sufficient capacity to supply boiler and heater with water taken from the well; * * * one Stillwell heater and connections complete. * * * This order is for the engine and boiler at Lesterville, Dakota Territory, with fixtures complete, except inspirator and heater; the latter to be replaced with the Stillwell heater. Said outfit to be in good order, except from exposure to weather at Lesterville, which has not damaged the real merits of the machinery.”

The machinery specified in the agreement was delivered to plaintiff. The petition alleges that the machinery was “warranted to be sufficient to furnish the motive power for the Aplington Grist and Flouring Mills, and be sound, and do good work, specified in said warranty. * * * That on a specified test thereof said engine, machinery and appliances sold by defendant to plaintiff proved defective and insufficient,

Blackmore v. Fairbanks, Morse & Co.

in this: That it throws crank case oil into the heater and boiler, so as to render it dangerous, insufficient and entails great expense in its operation, and is insufficient to furnish the motive power for plaintiff's said mill." The answer denies the alleged warranty, denies the alleged defects in the machinery, and avers that the cause of the throwing of crank case oil into the heater and boiler was the use by plaintiff of an open heater, without an oil extractor. The answer further avers, by way of counter-claim, that plaintiff and one Wandby, by means of a fraudulent conspiracy, caused defendant to ship for said Wandby, at Parkersburg, Iowa, a beam stock-scale and beam box for the agreed price of one hundred and sixty-five dollars; that said scale and beam box were marked to defendants at Parkersburg, and upon their arrival there they were taken under a writ of attachment issued in this action; that the order for said attached property was given by Wandby, at the request and for the benefit of plaintiff, in order to get property of defendant, a foreign corporation, within the jurisdiction of this court, and thus cause defendant to appear in this action; that the price of the scale and box is unpaid. Judgment is demanded therefor. The answer further avers that defendant was not the manufacturer of the machinery in question, and that in the sale thereof it acted only as agents for the manufacturer, the Westinghouse Machine Works. The counter-claim is denied.

I. Plaintiff testified to receiving the machinery, and that he proceeded to erect the engine. After describing what was necessary to be done, he stated that he had instructions in regard to it; that defendant sent him a plan. He was then asked this question: "Was it erected according to the plan?" and he answered "Yes." Defendant then objected to the question upon the ground that plaintiff should show the plan, and show how the machinery was erected; and the objection was overruled. The objection should have been made, if at all, before the answer was given. The interrogatory

1. EVIDENCE:
objection
too late: no
prejudice.

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related to an issue tendered by the answer, and was asked of plaintiff during his examination in chief, to support the averments of his petition. Defendant had an opportunity to cross-examine the witness, and test the accuracy of his answer. We do not find any attempt shown by the record to prove that plaintiff deviated from the plan furnished in setting up the machinery. In view of these facts no prejudice could have resulted to defendant from the ruling in question, even if it be conceded that the objection was made in time.

II. Plaintiff testified that the engine did not develop more than seventeen-horse power. He was then asked this question: "Was that sufficient for the propelling of the mill machinery?" The question was objected to, but no ground of objection was stated. The substance of the answer was that the power developed was not sufficient. The court was not obliged to sustain an objection for which no ground was suggested, even though a sufficient one in fact existed. It is the right of the court to know upon what ground the objector relies. It is now suggested that the question was improper because it was asked on the theory that defendant agreed to furnish an engine and boiler sufficient to run plaintiff's mill, but the court charged the jury that it only agreed to furnish an engine of twenty-five-horse power. The evidence tended to show that an engine of twenty-five-horse power would run the machinery of the mill. Therefore the answer tended to show that the engine furnished was not of that power. The ruling in question was not erroneous.

III. Plaintiff was asked: "If the engine and boiler and appliances, furnished under the order, had been in good order, and of real merit, would it have been worth the price you paid?" This was objected to on the ground that "the contract price is the established price between them, which they cannot deny." The objection

2. —: objection without ground stated.

3. —: objections: only stated grounds considered.

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was overruled, and plaintiff answered: "Yes, sir. It would have been worth more." Appellant complains of the question on the ground that defendant did not agree that the machinery should be "in good order, and of real merit," as assumed by the question. But the objection did not raise the question now discussed. The question was not a proper one, but no prejudice could have resulted from the defect pointed out by the objection made.

IV. Appellant complains that a witness named Wheater was permitted to testify, without showing himself qualified as an expert, that the engine did not furnish twenty-five-horse power. The witness was engaged in the milling business in the mill in question, and knew the engine in controversy. He stated that the engine only furnished about seventeen-horse power, and knew that fact by comparing the power it developed with that developed by three water-wheels in the mill, of known power. The power of those wheels was ascertained by actual measurement. We think it was competent for the witness to show the result of a comparison of the power developed by the wheels with that furnished by the engine. The power of the latter may have been ascertainable with greater accuracy, but we are of the opinion that the evidence was admissible for what it was worth. The same is true of certain testimony of plaintiff, to the same effect, to which objection is made.

V. Appellant complains of the refusal of the court to allow defendant to show that it was an agent for the sale of the Westinghouse engine at the time of the sale to plaintiff. It was not shown, nor was it proposed to show, that plaintiff knew of the alleged agency when he contracted with defendant; and in the contract it is named, and in all respects treated, as a principal. The evidence in question was therefore properly excluded.

VI. Other questions, based upon rulings of the court in regard to the introduction of evidence, are

4. —: power of engine: competency.

5. —: of agency: when not admissible.

 Blackmore v. Fairbanks, Morse & Co.

6. CONSPIRACY: stated, rather than discussed, by counsel.
 when not
 actionable: Among them is one relating to the refusal
 evidence. of the court to require plaintiff to testify in
 regard to his alleged conspiracy with Wandby for
 ordering the scale and appurtenances in controversy.
 Plaintiff testified that he was not, so far as he knew, the
 owner of that property. The order upon which it was
 shipped provided that it should be sent to defendant at
 Parkersburg; that Wandby should pay the purchase
 price upon the delivery to him at Parkersburg of the
 property; and that the title thereto should not pass from
 defendant until the purchase price had been fully paid.
 It is not claimed that the property was delivered to
 plaintiff, nor to Wandby; and it is shown that the price
 is unpaid. Therefore, under the issues in the case, the
 alleged conspiracy of plaintiff with Wandby was wholly
 immaterial, as it did not operate to deprive defendant
 of its property. We are of the opinion that there was
 no error in the rulings in question.

VII. Appellant complains of the refusal of the
 court to give certain instructions asked by it and of the
 giving of a portion of a charge on the same
 7. SALE: war- subject, which is as follows: "Under this
 ranty: when
 implied by law. contract, it was the duty of the defendant
 to furnish to the plaintiff an engine of the kind described,
 of twenty-five-horse power, and all other machinery
 and appliances specified in the contract, in good condi-
 tion, and fit for use, except as damaged by exposure to
 the weather at Lesterville, Dakota; and if the defendant
 failed and refused to furnish the plaintiff the said
 machinery in the condition specified it would be liable
 to the plaintiff for damages in such sum as you may
 find from the evidence, and under the instructions he
 has suffered." Appellant contends that its contract
 would have been fully complied with, had it delivered
 to plaintiff a Standard Westinghouse engine in the
 condition in which such engines are turned out at
 the factory, whereas the instruction given required
 defendant to deliver a Westinghouse engine in good

condition, and fit for use, except as damaged by the weather; or, in other words, that the court construed the contract to include a warranty that the engine to be delivered, not only had not suffered injury, except by the weather, since it left the hands of the manufacturer, but also that it was so constructed as to be fit for use, and for the use plaintiff desired to make of it. The rule in regard to an implied warranty of quality has been stated as follows: "So far as an ascertained specific chattel, already existing, and which the buyer has inspected, is concerned, the rule of *caveat emptor* admits of no exception by implied warranty of quality. But where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given." 2 Benj. Sales, sec. 966. See, also, *King v. Gottschalk*, 21 Iowa, 513. In this case, plaintiff had not inspected the property ordered, and had no opportunity to do so, when the order was given. On the other hand, defendant knew the use for which the property was intended. Therefore, unless excluded by the terms of the order, there was an implied warranty that the property was fit for the designed use, and that it was in merchantable condition. Appellant contends that the order, in effect, contains an express warranty that the property shall be in good order; hence that implied warranties must be excluded. It is true that, as a general rule, no warranty will be implied where the parties have expressed in words the warranty by which they mean to be bound (2 Benj. Sales, sec. 1002); but the rule does not extend to the exclusion of warranties implied by law, where they are not excluded by the terms of the contract. Thus, an express warranty of title does not exclude an implied warranty of quality. 2 Benj. Sales, sec. 1002, note 40, and cases therein cited; *Merriam v. Field*, 24 Wis. 640; *Boothby v. Scales*, 27 Wis. 632; *Roe v. Bacheldor*, 41 Wis. 360;

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Wilcox v. Owens, 64 Ga. 601; 10 Amer. & Eng. Cyclop. Law, 109. A warranty will not be implied in conflict with the expressed terms of the agreement; but there is no conflict of that kind in this case. The implied warranty that the machinery is fit for the use for which it was purchased is in harmony with the provisions specifying the power of the engine and boiler, and that it should be in good order, except from exposure to the weather, at Lesterville. We think the instruction in question was correct, and that those asked by defendant were properly refused. This conclusion is not in conflict with the cases relied upon by appellant, among which are *Warbasse v. Card*, 74 Iowa, 306; *Mast v. Pearce*, 58 Iowa, 579; and *Nichols v. Wyman*, 71 Iowa, 160. An examination of those cases will show that they decided, in effect, that the terms of an agreement in writing could not be varied or contradicted by evidence of a parol contemporaneous agreement. No question in regard to warranties implied by law was involved. The judgment of the district court is

AFFIRMED.

CITIZENS' NATIONAL BANK *et al.* v. JOHNSON *et al.*

1. **Chattel Mortgage: OF PARTNERSHIP PROPERTY: FORM, EXECUTION AND ACKNOWLEDGMENT OF.** F. J. was a member of the firm of A. T. J. & Son, the members of which were M. E. J., K. J. and himself. To secure a firm debt, he executed a chattel mortgage on the firm property, beginning, "I, A. T. J. & Son Co., per F. J., a member of the firm," and the mortgagor was afterwards referred to in the instrument thus: "I, the said A. T. J. & Co.," and "A. T. J. & Co., mortgagor." It was signed by F. J. and M. E. J., and K. J. consented to its execution, and it was acknowledged by "F. J., a member of the firm of A. T. J. & Son Co." *Held—*

- (1) That it was not invalid as a firm mortgage because the abbreviation "Co." was several times added to the true name of the firm, since that could have misled no one.
- (2) That F. J. had authority to bind the firm by a chattel mortgage made by himself to secure a firm debt, and that the signature of M. E. J. thereto was surplusage, and did not invalidate it.

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(3) That, at all events, no one but the other members of the firm, or those claiming under them, could question his authority to bind the firm by the mortgage.

(4) That the acknowledgment by "F. J., a member of the firm of A. T. J. & Son Co.," was sufficient.

2. ———: ———: BY TWO OF THREE MEMBERS OF FIRM: VALIDITY. A chattel mortgage, made to secure a firm debt, by two of three members of the firm, the other consenting thereto, but being unknown to the mortgagee as a partner, is valid as between the parties, though it does not purport to be a partnership mortgage; and is also valid as to subsequent attaching creditors who have notice of the facts.

3. ———: VALIDITY: DESCRIPTION. A mortgage of horses and vehicles which describes the horses by color, age and weight, and the vehicles by name, with the addition, "Said property kept in our stable in the city of Des Moines," is sufficient as to description; and so is a mortgage of "two landau hacks now in our possession at our barn" at a certain designated place in said city.

Appeal from Polk District Court.—HON. JOSIAH GIVEN, Judge.

FILED, FEBRUARY 3, 1890.

THIS is a contest between the creditors of A. T. Johnson & Son, a partnership formerly engaged in the omnibus and transfer business. The partnership failed on September 12, 1888. Its property was seized by writs of attachment, and the intervenors, McFarland and Nourse, claimed liens upon part of the assets by virtue of certain chattel mortgages. A trial was had, and said chattel mortgages were held to be invalid as to the other creditors. John McFarland and C. O. Nourse appeal.

Kauffman & Guernsey, for John McFarland.

C. C. & C. L. Nourse, for C. O. Nourse.

Mitchell & Dudley, Macy, Sweeney & Jones, J. H. Phillips and *E. J. Goode*, for appellees.

ROTHROCK, C. J.—I. Prior to the failure of the partnership, the intervenors, John McFarland and

C. O. Nourse, creditors of the firm, each took a chattel mortgage upon certain of the partnership property. The chattel mortgage held by McFarland was filed for record and indexed on the twelfth day of September, 1888, at 9:40 o'clock a. m., and the mortgage of C. O. Nourse was duly filed and indexed at four o'clock p. m. on the same day. After that time, and on the same day, and the day following, a large number of attachment suits were commenced by other creditors of the partnership, upon which writs of attachment were levied upon the firm property. There were also one or two mortgages upon the property other than those above mentioned. A receiver of the assets of the firm was appointed by the court, and an order was made that the property should be sold, and the proceeds held until the priority of the liens of the several creditors could be determined upon a trial. Petitions of intervention and other pleadings were filed by the respective parties, and, when the cause was presented to the court to adjust the rights of priority, the contest narrowed down to a determination of the question whether the mortgages of McFarland and Nourse were valid instruments, and superior liens upon the property to the liens of the attachments levied after said mortgages were filed for record. The district court determined that the mortgages were invalid, as against the attaching creditors, and the question presented for our determination is whether this ruling was correct.

Before entering upon an examination of the question, it is proper to state other facts which appear in the record. The partnership of A. T. Johnson & Son in the omnibus and transfer business was originally composed of A. T. Johnson and his son, Frank Johnson. A. T. Johnson died in the year 1883, and left surviving him his wife, M. E. Johnson, and his two children, Kate and Frank Johnson. These three parties continued in the same business, under the original partnership name, until their failure as above stated. Frank Johnson and M. E. Johnson owned some property in

their own right, but, as the property in controversy was all owned by the partnership, the rights of the individual partners to such of the property as was owned by them need not be considered. It is conceded to be a fact that none of the creditors knew when they extended credit to the firm that Kate Johnson was a partner therein. This was discovered when the general scramble came among the creditors for priority in their attachments. The pleadings in most, if not all, of the cases were prepared upon the theory that Frank Johnson and M. E. Johnson were the only partners. Amendments were afterwards made averring that Kate Johnson was also a partner. The appellants took their mortgages in the same belief.

We come, now, to consider the question as to the validity of the mortgages. It was claimed in the court below, and is claimed here, that the mortgages are void as to the attaching creditors, upon these grounds: The *first* ground is that the property mortgaged was partnership property, and the mortgages were not made by the partnership; *second*, that the description of the property in the mortgages was so indefinite and uncertain that they are void; and, *third*, that the mortgages were not properly acknowledged, and did not impart constructive notice to the other creditors.

The mortgage to McFarland described the mortgagor as follows: "Know all men by these presents that I, A. T. Johnson & Son Co., per Frank Johnson, a member of the firm, of the county of Polk and state of Iowa, in consideration of the sum of nine hundred dollars to me in hand paid," etc. The name of the firm when repeated in the mortgage is in this form: "I, the said A. T. Johnson & Co.," and "A. T. Johnson & Co., the said mortgagor." When the name of the firm is repeated, it is accompanied with the reference to the "said mortgagor;" evidently meaning thereby to refer to the name A. T. Johnson & Son Co., the first name used in the mortgage. It is claimed

1. CHATTEL mortgage: of partnership property: form, execution and acknowledgment of.

that this was not a mortgage made by A. T. Johnson & Son. When the whole instrument is considered, the only real ground of the claim is that the contraction "Co." is used in connection with the true name of the partnership. It appears to us that this attack upon the mortgage is exceedingly technical. The word "Co." would not mislead any searcher of the records. Suppose it had been written out in full, and the name of the mortgagor had appeared as "A. T. Johnson and Son Company." It would have been equivalent to "A. T. Johnson & Son Partnership." We do not think that important rights should be made to depend upon so unimportant a departure from the true name.

The mortgage is signed by "M. E. Johnson" and "Frank Johnson," without other designation. It is claimed that the signatures show that the mortgage was not made by the firm. But the signatures must be construed with reference to the body of the instrument, and it is therein recited that the mortgage is made by the partnership, "per Frank Johnson, a member of the firm." His signature was all that was necessary, and the fact that the name of another member of the partnership was signed to the instrument in no manner affected its validity. It is conceded by counsel for the respective parties that one partner may mortgage the firm property to secure a firm debt. This has been the law of this state for many years. See *Fromme v. Jones*, 13 Iowa, 474. It appears that all the partners, including Kate Johnson, assented to the giving of the mortgage, and, this being the fact, the question as to the power of Frank Johnson to bind the firm by the mortgage can be raised only by the other partners, or by some one who claims through them.

It is also claimed that the acknowledgment of the instrument is defective. It purports to be acknowledged by "Frank Johnson, a member of the firm of A. T. Johnson Son Co." We are not aware of any form of acknowledgment required by statute where one member of a firm mortgages property of the firm for a

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partnership debt, and it appears to us the acknowledgment is sufficient.

II. The mortgage to Nourse was made and signed by Frank Johnson and M. E. Johnson, and did not purport to be a mortgage of the partnership. ^{2. —: —: by two of three members of firm: validity.} But it was given to secure a partnership debt, and as has been said, Nourse believed at the time the makers of the mortgage were the full and absolute owners of the mortgaged property. The mortgage was given to secure the payment of money loaned by Nourse to the firm. Kate Johnson knew of the transaction at the time; and assented to it, or, at least, made no objection. We think this mortgage was also a valid instrument. We may say here, in reference to both of the mortgages, that, aside from the constructive notice imparted by law to the appellees, the evidence shows quite satisfactorily that the appellees had actual notice of all that is now claimed for these mortgages before their attachments were levied upon the property. Surely, if the mortgages were valid between the parties thereto, and the appellees had actual notice of them, they could acquire no rights superior to them.

III. The only other question which we deem it necessary to examine is the claim that the description ^{3. —: validity: description.} of the property in the mortgages is so indefinite that no notice was imparted thereby to the attaching creditors. This claim may be disposed of very briefly. Aside from the consideration that appellees had actual notice of the mortgages, and were bound thereby, as held in *Manufacturing Co. v. Griffith*, 75 Iowa, 102, and cases there cited, we think the description in these mortgages is sufficient. The horses mortgaged to McFarland are described in the mortgage by color, age and weight, and the vehicles by name, and there is the following recital in the mortgage: "Said property kept in our stable in the city of Des Moines." The description of the property in the mortgage to Nourse is as follows: "Two

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landau hacks now in our possession at our barn on North street, near Market street, Des Moines, Iowa. Said hacks are made by Cruttenden & Co." It seems to us that these descriptions are sufficiently definite to meet every requirement of the law. The decree to the district court will be

REVERSED.

In re ESTATE OF GILL.

1. **Dower: WIDOW OF "NON-RESIDENT ALIEN;" WHO IS.** In section 2442, of the Code, providing that "the widow of a non-resident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from the decedent," the words "non-resident alien" mean an alien who is not a resident of Iowa, and not one who is also a non-resident of the United States.
2. ———: ———: CODE, SEC. 2442: "PURCHASER." The word "purchaser" in said section 2442 includes mortgagees; and where a non-resident alien in his lifetime mortgaged land in Iowa without release of dower by his wife, *held* that, after his death, she was entitled to dower in only so much of the mortgaged property as remained after satisfying the mortgages.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FILED, FEBRUARY 3, 1890.

ON petition of the administrator for an order to sell real estate to pay debts.

There is no controversy as to the facts, and those necessary to an understanding of the questions presented are as follows: William John Gill, an alien, and subject to Great Britain, resided in Iowa up to, and for some years prior to, 1880, after which he resided in other of the United States to the time of his death, in 1887, at which time he was a resident in the state of New Jersey. He left Elizabeth Gill, his widow, but no children, surviving him. Mrs. Gill was also an alien,

79	296
88	164
79	296
105	347
79	296
138	136

In re Est. of Gill.

and subject of Great Britain, and never resided in the United States. During his residence in Iowa, Mr. Gill purchased and took title of certain lots in the city of Des Moines, and afterwards, desiring to mortgage said lots to secure a loan of money, he applied to the circuit court of Polk county for an order, under sections 2216, 2219, Code, appointing a guardian to release the interest of his wife in said lots, alleging as reason therefor that she was insane. No notice was given to Elizabeth Gill, nor to any one on her behalf, of said proceeding; but an attorney of the court was appointed by the court to defend her interests. On final hearing, an order was granted appointing said William John Gill as such guardian for said purpose; and thereafter, for himself, and upon the authority of said order, he executed a mortgage to Lederer & Straus, to secure two thousand dollars, which mortgage is now the property of the trustees of Stephen Sibley's estate, and a second mortgage to J. B. Stewart, to secure one thousand dollars. In each of said mortgages he, as such guardian, released as to the interest of appellant in said lots. The appellant having filed her answer and cross-bill, claiming one-third of said property as her distributive share, the administrator replied, alleging the facts to be in substance as above stated. To this reply appellant demurred upon the grounds that the facts stated constitute no defense to her cross-bill; that the proceedings of the circuit court were void for want of notice; and because, if no notice was required by the statute, the statute was unconstitutional. This demurrer was overruled; and, appellant electing to stand thereon, and the trustees of the Sibley estate and said J. B. Stewart having appeared and pleaded, the cause was submitted on the pleadings, and on an admission of the copy of the record entry of said proceeding in the circuit court. An order was made for the sale of the property, and decreeing appellant's rights and interests therein to be junior to said mortgages, and that she is only entitled to receive one-third of the surplus realized from the sale

In re Est. of Gill.

after satisfying said mortgages. From this order and decree said Elizabeth Gill appeals.

Bousquet & Earl, for appellant.

Mitchell & Dudley, Berryhill & Henry and St. John, Stephenson & Whisenand, for appellees.

GIVEN, J.—I. It will be seen by the foregoing statement that both Mr. and Mrs. Gill were aliens; that Mrs. Gill never resided in the United States, and that Mr. Gill had not resided in this state since 1880, and at the time of his death, in 1887, he was a resident of the state of New Jersey. Code, section 2442, is as follows: "The widow of a non-resident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from the decedent."

The first question presented is whether the deceased was a non-resident, within the meaning of this section, appellant's contention being that "non-resident," as here used, means non-resident of the United States, while appellees contend that it means a non-resident of this state. No question is made but that it is within the power of the state to declare and regulate the property rights of aliens with respect to property within the state. Our legislation on this subject, like that of many other states, has enlarged the property rights of aliens quite beyond that given them under the common law. The policy of this state, as shown in its constitution and laws, has been to encourage foreigners to become residents of the state, and to aid in its development, and share in its prosperity. Section 22, article 1, Bill of Rights, provides that "foreigners who are, or may hereafter become, residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and descent of property as native-born citizens." See, also, chapter 1, tit. 13, Code, secs. 1908, 1909. Section 2440, Code, provides, without qualification as to residence or citizenship, the share of the

1. DOWER: widow of "non-resident alien:" who is.

In re Est. of Gill.

estate of the deceased husband or wife that shall go to the survivor. Were it not for section 2442, appellant's rights in the estate of her husband would be unaffected by his residence or citizenship. The evident purpose of section 2442 is to encourage the purchase of lands within the state from non-resident alien owners, and to protect purchasers of such real estate against claims for dower or distributive share therein. Among the reasons for such a provision is the difficulty of knowing the relations of such non-residents. Without such a provision, titles derived from non-resident aliens, in which the husband or wife does not join, would be left in uncertainty for an indefinite period of time. Appellant cites said section 1908, Code, wherein it was provided that "aliens, whether they reside in the United States or any foreign country, may acquire, hold and enjoy property," etc., and contends that thereby aliens are divided into two classes,—those residing within, and those residing without, the United States. This is not a classification of aliens, nor a declaration that all aliens may acquire, hold and enjoy property, etc.; and, to render it certain that all aliens are meant, and avoid any questions that might arise because of the restrictions of the common law, it is declared, "whether they reside in the United States or in any foreign country." If this were a classification of aliens, it is certainly not with reference to the section of the Code under consideration. In view of the language and purpose of section 2442, we are of the opinion that a "non-resident alien," as therein expressed, means an alien not residing in this state, and that William John Gill, deceased, was such a non-resident alien.

II. Appellant's next contention is that, though Mr. Gill was a non-resident alien, yet that his mortgagees are not purchasers from him; that the term "purchasers," in section 2442, is used in the sense of "buyer, or one who has acquired title;" and that these mortgagees acquired no interest or title in the real estate mortgaged, and hence are not purchasers. The law recognizes but two ways

2. —: —:
Code, sec.
2442: "pur-
chaser."

of acquiring property,—by descent and by purchase. These mortgagees surely acquired property by their mortgages, and acquired it by purchase. While it may be said that they did not acquire title to the real estate, they certainly acquired an interest in it that they did not theretofore have. It is conceded that under the recording acts they are deemed purchasers. The same reasons for protecting purchasers of unconditional titles from non-resident aliens against claims for dower apply with equal force to mortgagees from such. Our conclusion is that mortgagees of non-resident aliens are purchasers, within the meaning of section 2442, and that these mortgagees are, therefore, entitled to priority over the claim of the appellant.

III. The views already expressed render it unnecessary that we notice the questions made as to the legality of the proceeding had in the circuit court, or the claim of the mortgagees that the debt secured by their mortgages was for money loaned to pay on the purchase price of the property. It only remains to determine whether appellant is entitled to one-third of the entire property, subject to the mortgages, or only to one-third of what is left after the mortgages are satisfied. Regarding these mortgagees as purchasers, the deceased died possessed only of what is left of the property after satisfying the mortgages; and it is only in one-third of what he possessed that she is entitled to share. We think the decree of the district court is right, and should be

AFFIRMED.

THE SAME.

THE BANK OF MONROE V. GIFFORD.

1. **Sureties: COLLATERAL SECURITY: "CONTROL" OF IMPLIES DELIVERY AND ACCEPTANCE.** In an action against the surety upon a promissory note, the defense was that defendant was discharged by reason of the surrender by the plaintiff to the principal debtor of certain bonds which it held as collateral security; and the court instructed that if plaintiff "controlled" such bonds at the time the

79	300
91	234
79	300
98	129
79	300
98	215
79	300
108	355
79	300
111	466
79	300
124	251

Bank of Monroe v. Gifford.

note was executed, as security for the debt secured by the note, and afterwards surrendered them without defendant's consent, then defendant was discharged. *Held* that the word "controlled," as used, implied a delivery of the bonds to plaintiff and an acceptance of them by it.

2. ———: DISCHARGE BY SURRENDER OF COLLATERALS: PAYMENT OF DEBT BY NOTE. The giving and accepting of a promissory note for a prior debt will not be regarded as payment thereof, unless there be an agreement of the parties to that effect (see opinion for citations); and where the note is signed by one as a surety, and the creditor at the time holds collateral security for the debt, the agreement to make the note an absolute payment of the debt, so as to justify the creditor in surrendering the collateral security held for that debt, must, in order to bind the surety, be assented to by him; otherwise the surrender of the collaterals without his consent will release him from obligation as surety.
3. Practice: SENDING JURY BACK TO AMEND ANSWER TO QUESTION. Where a jury misconceives the true import of a special interrogatory, and fails to answer it according to its true intent, the court may submit a supplementary interrogatory and send the jury back to answer it. (See opinion for citations.)
4. Evidence: RECORD OF TESTIMONY AT FORMER TRIAL. The record of the testimony of witnesses at a former trial is admissible in a subsequent trial of the case, where the witnesses reside in a county of the state other than that in which the trial is pending. (See opinion for statutes and cases cited)
5. ———: COPIES OF MORTGAGE RECORDS. Duly authenticated copies of the record of mortgages and conveyances are admissible as tending to show the insolvency of the grantor therein.
6. Sureties: DISCHARGE BY SURRENDERING COLLATERALS: TO WHAT EXTENT DISCHARGED: OTHER SURETIES. Where a note with a surety is given for a portion of a prior debt, for which the creditor holds bonds secured by mortgage as collateral security, and he surrenders such collaterals without the surety's consent, the surety is discharged to the extent of the value of the bonds so surrendered; and such value is to be determined in the county where the mortgaged land lies, rather than in that where the trial is pending, and is to be estimated at the time of the surrender, and not at the time of trial; and the fact that there are other sureties on other notes given to secure portions of the same prior debt, which sureties are not in the case, does not affect the surety's right to be discharged to the full value of the surrendered bonds.
7. ———: ———: ESTOPPEL TO DENY VALUE. In such case, where the creditor has recognized the value and validity of the collaterals, and has received money thereon, which should have been applied on the secured debt, he cannot claim that the surety should not be released, on the ground that the bonds were issued in excess of corporate power, and, therefore, were invalid and of no value.

Bank of Monroe v. Gifford.

Appeal from Jasper District Court.—HON. W. R. LEWIS, Judge.

FILED, FEBRUARY 3, 1890.

ACTION upon a promissory note. There was a judgment upon a verdict for defendant. Plaintiff appeals. The facts, so far as they are necessary to be stated for a proper understanding of the questions decided, appear in the opinion. The case has twice heretofore been in this court. See 65 Iowa, 692; 72 Iowa, 750.

Winslow & Varnum and *J. Kipp & Son*, for appellant.

J. F. Lacey, *W. R. Lacey* and *Alanson Clark*, for appellee.

BECK, J.—I. The questions arising in the case will be considered in the order of the argument, as far as practicable. The facts will be stated, as their consideration becomes necessary in the discussion of the questions determined.

The evidence shows that one R. C. Anderson was the cashier of plaintiff, and at the same time was the president and general manager of a corporation engaged in mining coal, called the "Anderson Bros. Mining & Railway Company." He appropriated the funds of the bank to the use of the corporation, and, his improper practice in this regard being discovered, he was required to secure and make good the amount of his defalcation to the bank. He induced defendant to unite with the Anderson Bros. Mining and Railway Company in executing a note to the president of the bank, to be used in adjusting the claim of plaintiff for the indebtedness arising from the defalcation. He induced two other persons to execute, with the mining and railway company, two other separate notes, for like amounts, to be used for the same purpose. The note

Bank of Monroe v. Gifford.

signed by defendant was delivered to the president of the bank, and by him transferred to the plaintiff. As a defense to the action, the defendant pleaded that, at the time the note was executed and transferred to the bank, it held certain bonds of the principal of the note, the mining and railway company, of value greatly in excess of the amount of the note executed by defendant as surety, which were, without defendant's knowledge or consent, released from the claim held by plaintiff thereon, and delivered to the mining and railway company, which was then, and ever since has remained, insolvent. By this unauthorized and unjust act defendant sustained damage exceeding the amount claimed upon the note.

The defense set up by this answer presents all questions arising on this appeal, the court below so ruling as to withdraw other defenses pleaded from the jury. The jury found a general verdict for defendant, and found specially that the defendant signed the note as surety of the Anderson Bros. Mining and Railway Company; that the note was not taken in absolute payment of the debt of the company to the plaintiff, but only as a change of form thereof; that plaintiff held at the time, as security for the Anderson debt, the bonds of the mining and railway company; that these bonds, at a date five months or more subsequent to the execution of the note and its delivery to plaintiff, were surrendered to the Andersons or the mining and railway company; that the market value of the bonds was a sum largely in excess of the note in suit; that when the bonds were surrendered the debt for which they were held as security had not been paid, and that when plaintiff surrendered the bonds it received therefor an amount in excess of the sum due upon the note. The jury also specially found that Anderson, in taking the bonds as security for the debts of the company, acted for both the bank and the company; that after the officers of the plaintiff learned of the deposit of the bonds, they retained and controlled them; that the

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bonds were secured by mortgage; that about five months after the delivery of the bonds to the plaintiff it consented that Anderson should take them; that at the time plaintiff knew that defendant was surety on the note in suit; that at the time they were of the face value of fifteen thousand dollars, and of the market value of six thousand dollars; that, a few days before the bonds were surrendered by plaintiff, it received a sum thereon, stated in the subsequent findings as exceeding the amount due at the time upon the note in suit, and that the mining and railway company was at the time, and still is, insolvent.

The foregoing statement of the findings of the jury renders unnecessary a further statement of facts in this proceeding. As applicable to the issues and facts involved in the defense submitted to the jury, the court below gave the following instructions:

"3. If you find from the evidence that prior to the execution of the note in suit the principal maker, Anderson Bros. Mining & Railway Company, was indebted to the plaintiff, on account, in about the sum of thirteen thousand, seven hundred and eighty-four dollars; that the note in suit was given, not in part absolute payment of such indebtedness, but to change its form, or the evidence of it, or as additional security to the extent of the note; that the defendant Gifford was only surety on said note; that at the time of taking said note the plaintiff controlled any alleged mortgage bonds, or bonds secured by mortgage on property, no matter by whom the bonds were made or signed, as security for the pre-existing debt, if such bonds were of any value as such security; and if the plaintiff knew that Gifford was only surety on the note, it had no right to release or surrender its control of the bonds without the consent of the defendant Gifford; and, if you find that it did so without receiving in their stead something else of equal value as security, he is released from liability on the note to the extent of the loss resulting from such surrender, which is to be determined by the value of the security, as such, at the time

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it was surrendered. If such bonds were those of the principal maker of the Gifford note, Anderson Bros. Mining & Railway Company, and were not secured, their release or surrender would not work Gifford's release to any extent whatever; and although they may have been secured by mortgage on property of some value, and may have been in a box in plaintiff's safe, if they had not been accepted, or in some manner been brought under the control of the plaintiff as security for the debt mentioned, it was not bound to hold them.

"4. By the word 'payment,' as it is used in paragraph three of these instructions, is meant absolute payment; such payment as finally ended the part of debt or debt paid. In the absence of any agreement between the debtor and the creditor, a note, even though signed by another as surety for the principal debtor and the principal, which is given for a pre-existing debt, is no more than a conditional payment, and the creditor holds both; but if they at the time so agree, or the creditor so accepted the note, the new evidence of debt puts an end to the old, and works and is absolute payment of it; and in such case the creditor is not under obligations to hold, for the benefit of the surety, any security which the creditor may have held for the payment of the debt in its old form, while in the first, or the case of a conditional payment, the creditor is under such obligation. The plaintiff in this case has the burden to show that the note in suit was taken and accepted by it in absolute payment of so much of the Anderson Bros. Mining & Railway Company's pre-existing debt, but, if it does this by the preponderance of the evidence, your verdict will be for the plaintiff for the full amount of the note; as, if the defendant's (Gifford's) note worked an absolute payment to its extent of the old debt, any security held by the plaintiff remained as such for the payment of the unpaid portion, and not for the benefit of the defendant. If, however, the defendant's note worked no more than conditional payment of so much of the old debt, and the plaintiff

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was thus under obligation to hold securities in its hands for the defendant's benefit, a subsequent payment, although absolute, of that part of the old debt which was not so conditionally paid by the defendant's note, did not release the plaintiff from the duty to hold the security, if any it had, for the defendant's benefit.

"5. If you find from the evidence that at the time any bond or bonds in question were deposited by R. C. Anderson in the safe of the plaintiff, if such deposit was made as security of a debt of Anderson Bros. Mining & Railway Company, he was the president and manager of this company, and also the cashier of the plaintiff bank, and that he undertook to act for both, and to make the deposit for the one, and to accept such deposit for the other, neither was bound by what he did; and, if nothing more was done by way of deposit and acceptance of the bond or bonds, your verdict will be for the plaintiff; or, if afterwards when the other officers of the bank first knew of what Anderson had done, they refused to accept or take control of the bonds, and they never did so, although permitting them to remain in the safe in a box with papers belonging to Anderson or Anderson Bros. Mining & Railway Company, your verdict will be for the plaintiff. If, however, when the other officers of the bank knew of what Anderson had done, they accepted the bond or bonds, or took control of them, although expressing themselves as dissatisfied therewith, and demanding other and additional security, the bonds were under the plaintiff's control, which means that they had actually passed from Anderson's or Anderson Bros. Mining & Railway Company's possession to the possession of the plaintiff; that something had actually been done to indicate that there had been a change of possession from said company to the bank; and if there was nothing done to indicate such change of possession, but the bonds or the bond remained afterwards in precisely the same situation as when in the possession of Anderson or Anderson Bros. Mining & Railway Company,

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although in a box in the plaintiff's safe, it cannot be said that such bonds or bond was under the control of the plaintiff as security."

The consideration of these instructions, and the special findings of the jury, will dispose of the main, if not the controlling, questions in the case.

II. We will proceed, now, to the consideration of objections to the foregoing instructions presented in argument by plaintiff's counsel. Criticisms of these instructions are based upon

1. SURETIES :
collateral
security :
"control" of
implies de-
livery and
acceptance.

the use of the word "control," as applicable to plaintiff's possession of the bonds alleged to have been held by it as collateral security on its claim against the mining and railway company. In the first instruction, in stating the issues upon the answer setting up the defense of suretyship and the holding and surrender afterwards of the bonds, the court states, in effect, that the answer alleged that when plaintiff "took said note it controlled certain mortgage bonds of the value of seventy-five hundred dollars, which had been deposited to secure the payment of both the old debt and said note." In the third instruction this language is used: "At the time of taking said note, the plaintiff controlled any alleged mortgage bonds * * * as security for the existing debt." The word "control," it will be noticed, occurs near the end of the fifth instruction. The effect of the instruction is to direct the jury what would amount to an acceptance of the bonds, or the "control" of plaintiff, as security. It is very plain that the control of papers as security on a debt implies such a possession thereof under a delivery to the holder, and such acceptance, as will perfect the security. How could one "control as security" paper unless there had been an acceptance thereof as such? Counsel's criticism, to the effect that the instruction, by the use of the word "control," implies that the bonds should be regarded as security, without any showing of an acceptance thereof, demands no further attention.

III. It is insisted that the first instruction, in stating the issues, erroneously states that the bonds were held as collateral security for the debt of the mining company, existing both before and after the note was given. It is said that it is not alleged in the answer that the bonds were security on the debt before the note was executed, *i. e.*, on the old debt. But, in alleging that the bonds were held as collateral for the debt before the note in suit was executed, it plainly affirms the bonds were security on the old debt. Some other objections, based upon other criticisms of the instructions, do not demand attention.

IV. Counsel for the plaintiff maintain that the special finding of the jury, to the effect that the note was not accepted as payment of the debt, is without the support of the evidence, and on that ground should have been set aside.

2. — : discharge by surrender of collaterals : payment of debt by note. The giving and accepting of a promissory note for a prior debt will not be regarded as payment thereof, unless there be an agreement of the parties to that effect. *Farwell v. Salpaugh*, 32 Iowa, 583; *McLaren v. Hall*, 26 Iowa, 297; *Gower v. Halloway*, 13 Iowa, 154; *Port v. Robbins*, 35 Iowa, 208. It cannot be said that the finding of the jury as to the non-existence of an agreement or an arrangement to the effect that an acceptance of the new note should be a discharge of the debt is so unsupported by evidence as to demand that the verdict be set aside. There is evidence tending to support the conclusion that it was the purpose on the part of the officers of the plaintiff that the debt should be discharged on the acceptance of the note. This evidence is weakened by its want of probability, for we can see no reason that prompted plaintiff to discharge its debtor, and look alone to the new security. Such things are unusual. We discover no evidence tending to show an agreement on the part of defendant and the mining company that the old debt should be discharged. The rule under consideration is intended for the benefit of the surety. He is entitled to the protection secured by the

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law, the rules whereof favor him. When he becomes surety, his right to require all prior securities to remain unchanged becomes fixed. He, it is presumed, entered into the contract, relying upon the protection secured by the law. Can the creditor and the principal, or either of them, assent to a change of securities so as to prejudice the surety? Surely, the law will not, leaving a surety to the mercy of the creditor or principal, permit either or both of them to surrender his rights upon their united or separate agreement. In the case before us there is not one word of evidence tending to establish his consent to the discharge of the debt of his principal when he became a surety.

V. Another view leads to the conclusion that the facts fail to show a lawful release of the bonds held as security by plaintiff. The bonds were in the hands and under the control of plaintiff, as security for the debt, before the note was executed. They remained in plaintiff's hands for four months, and were finally surrendered upon realizing thereon a sum equal to the amount due on the note in suit. They continued to be security upon the claim of plaintiff. They were treated by all concerned as such. Of course, they could not be relieved by plaintiff without the consent of defendant. No such consent was given. This position is in accord with the instructions given the jury. The jury were authorized by the evidence to find the facts we have just stated, and, as a conclusion therefrom, that the bonds were held as security when defendant signed the note, and were not surrendered with his knowledge and consent.

VI. Counsel insist that there is no evidence that the bonds were ever accepted as collateral security by the bank. It is sufficient to say that the evidence shows that the bonds were under the control of plaintiff, were regarded and treated as collateral, and finally, in order to secure their discharge, plaintiff consented that they should be delivered to Anderson or the mining company. Other objections to the findings, on the ground that they are in conflict with the evidence,

demand no separate consideration. We may dispose of them by the remark that the general and special verdicts are all sufficiently supported by the evidence.

VII. One of the interrogations, the fourteenth, which was submitted to the jury for a special finding, is in the following language: "Did the plaintiff receive anything for the bond or bonds in question when same was taken from its control or safe?" They answered in these words: "They did, a few days before." After the verdict and special findings were read, the court, upon its own motion, directed the jury to retire, and answer this interrogation: "What was the value of that which you answer, to interrogation fourteen, the plaintiff received for the bond or bonds, when same were taken from its control or safe?" The answer to this interrogation was: "Twenty-seven hundred and eighty-four dollars." The fourteenth interrogatory was doubtless intended to elicit an answer showing the amount of money or value of the thing received. In failing to respond, the jury, through inadvertency, omitted to state a material point of the finding required. This was an omission and mistake, which the court was authorized to require them to correct by directing them to answer as to the amount of money or value of the thing received. *Lee v. Bradway*, 25 Iowa, 216; *Higley v. Newill*, 28 Iowa, 516; *Hamilton v. Barton*, 20 Iowa, 505.

VIII. The defendant submitted eighteen interrogations, which it asked the jury should be required to answer in special findings. The court refused to require the questions to be answered. Of this defendant now complains. Many of the facts sought to be elicited were called for in the questions submitted to the jury by the court. Other facts sought by the questions refused were immaterial, or of a character which did not require that they should be presented in special findings.

IX. Counsel argue that plaintiff was a good-faith holder of the note, in the usual course of business, and,

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therefore, ought to recover on it. If counsel's position as to the fact be admitted, yet it does not follow that his conclusion of law as to the right of plaintiff to recover, in view of other facts of the case, is correct. Defendant was a surety on the note, which was known to plaintiff when it received the papers. These facts are contemplated in the instructions, and must have been found by the jury in the general verdict. The law as to the rights of sureties protects defendants, for the reason that plaintiff took the note with the knowledge that defendant was surety thereon. This view disposes of all of counsel's arguments based upon the position that plaintiff was a good-faith holder of the note.

X. At the trial the evidence of certain witnesses examined at a prior trial, which was taken in shorthand and made of record in the case, was admitted against the objection of plaintiff.

4. EVIDENCE: record of testimony at former trial. It was shown that the witnesses lived in a county of the state other than the county wherein the trial was had. The evidence was rightly admitted. Code, secs. 3721, 3777; *Baldwin v. Railway Co.*, 68 Iowa, 37; *Fleming v. Town of Shenandoah*, 71 Iowa, 456.

XI. Defendant, against plaintiff's objection, was permitted to introduce in evidence certain copies of the record of conveyances and mortgages duly authenticated by the county recorder. The admission of this evidence is now complained of as error, for the reason that no ground was shown for the admission of copies of the record. It does not appear for what purpose copies of the record were admitted. They would surely be evidence of the condition of title to property, and incumbrances thereon, which would tend to show the insolvency of the mining company which was in issue in this case; for, had it been solvent, no damages would have resulted to defendant by the release of bonds held as security. There was no error in admitting the evidence.

5. —: copies of mortgage records.

XII. Counsel discuss at length the question involving the amount of damages plaintiff is entitled to

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6 SURETIES:
discharge by
surrendering
collaterals:
to what ex-
tent dis-
charged:
other sure-
ties.

recover. The value of the bond at Oskaloosa, it is insisted, is erroneously shown, instead of the value in the county where the suit was brought and tried. But the land covered by the mortgage securing the bonds was situate in Mahaska county.

Surely in that county inquiry should be made as to the value of the bonds.

The bonds, when surrendered by plaintiff, were worth six thousand dollars. But counsel for plaintiff say that, as defendant had no right of action at that time, the value of the lands at that date cannot be considered in determining defendant's damages. But, in our view, the value of the bonds, when disposed of, determined the amount of damages; for their disposition, without regard to the rights of plaintiff or defendant at that time to bring action in regard to them, fixed their liability for the value of the bonds at that time. Plaintiff could have realized the value of the bonds at the time they were disposed of. Its duty to the sureties demanded that it should not suffer the bonds to escape liability for the debt for which defendant was surety, and, if plaintiff had the power to surrender the bonds, which it did possess, for it did surrender them, its duty was to see that the surety had the benefit of the bonds to the extent of their value.

Counsel present an ingenious argument to establish the proposition that, as there were other sureties who, with defendant, were bound for eleven thousand dollars, defendant, who was bound but for twenty-five hundred dollars, can recover no more than a proportionate amount of the six thousand dollars to which he would be entitled. The reply to this is that the other suits are not before us. We are not charged with settling the rights of defendant, as affected by the rights and claims of other suits. We know not that the claims in these others suits have been or ever will be enforced. In short, we cannot defeat defendant's rights on the ground that other persons, who are not parties to this

Bray v. Flickinger.

suit, could have, or may hereafter claim that they were entitled to, a portion of the proceeds of the bonds.

XIII. It is urged that the record shows that the bonds issued by the mining company, which were held by plaintiff, were issued in excess of the corporate power of the mining company, and, therefore, void. The conclusion is insisted upon that defendant cannot, therefore, recover damages for the release of these bonds. The plaintiff has recognized the bonds as valid,—has received money for them. It does not deny that they could have been converted into money. It cannot now prescribe for defendant a remedy it refused to take. It cannot say the bonds were valueless when it received and held money realized from them, which ought to have been appropriated to protect those who had become sureties for the mining company. Many other points are made by plaintiff's counsel, and supported by arguments. We do not consider them, for the reason that, in our judgment, they do not demand discussion in this opinion, as no other than familiar rules of the law are involved therein. In our opinion, the judgment of the district court ought to be

AFFIRMED.

BRAY V. FLICKINGER *et al.*

1. **Evidence: WRITING: GENUINENESS CHALLENGED: CONTENTS.** Where defendant relied upon a written instrument purporting to be made by plaintiff, but the genuineness of which plaintiff questioned, evidence of the contents of the instrument was properly excluded in the absence of any attempt or offer to prove its genuineness.
2. **Chattel Mortgage: MORTGAGOR'S OWNERSHIP: EVIDENCE.** Where S. mortgaged goods which he had in his possession under a contract giving him the right to purchase them from plaintiff at a certain price, but it was not shown that he ever exercised that right, and plaintiff testified that he still owned the goods, held that the evidence did not establish the right of the mortgagee as against the plaintiff.

79	313
127	403

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3. ———: ———: EVIDENCE OF MORTGAGEE'S BELIEF. Defendant having been permitted to testify that he believed his mortgagor owned the mortgaged chattels, it was immaterial what his reasons for so thinking were.
4. Evidence: RECOMMENDATION TO CREDIT: WHEN IMMATERIAL. It was immaterial what if any recommendation plaintiff gave of one of whom defendant took a chattel mortgage, in the absence of any offer to show that defendant knew of or relied on such recommendation.
5. Contract: RIGHT TO TERMINATE: SALE OF GOODS AND DIVISION OF PROFITS. Where plaintiff placed goods in the hands of another to be sold, the latter to have all the profits up to a certain sum per month, and the residue of profits to be divided equally, "to such time as the party of the first part [plaintiff] may choose," *held* that plaintiff had the right to terminate the contract at any time.

Appeal from Pottawattamie District Court.—HON.
C. F. LOOFBOUROW, Judge.

FILED, FEBRUARY 4, 1890.

ACTION of replevin. There was a judgment on a verdict for plaintiff. Defendant appeals. This cause has before been in this court. See 69 Iowa, 167.

Flickinger Bros., for appellants.

Smith, Carson & Harl, for appellee.

BECK, J.—I. The plaintiff claims the ownership of the goods in controversy. The defendant claims the possession of the property under a mortgage executed by one Skiles, who was in possession of the goods, and alleged to be the owner thereof, at the time the mortgage was executed. The plaintiff in a reply alleges that defendant, at the time the mortgage under which he claims was executed, had actual personal knowledge of plaintiff's ownership of the goods.

II. The defendant testified that, before the mortgage under which he claims was executed, Skiles stated that he owned the goods, and exhibited to defendant a bill of sale thereof, purporting to be executed by plaintiff. It appears from the evidence that there was a question

1. EVIDENCE:
writing: genu-
ineness chal-
lenged:
contents.

Bray v. Flickinger.

about the genuineness of this instrument. Defendant testifies that he thought it genuine, and assigns the reasons upon which this opinion was based. He does not testify or claim, in his pleadings or otherwise, that the bill of sale was genuine. There is not one word in the abstract tending to show that fact, or that it was claimed by defendant. Surely, the court rightly excluded the offered evidence of the contents of the instrument, where its genuineness was questioned, and no offer was made to prove it genuine and valid. It would be vain to establish the contents of an instrument when the party offering the evidence made no claim of readiness and ability to establish its genuineness. The facts that defendant at the time he accepted the mortgage was shown the bill of sale, and believed it genuine, he was permitted to prove. In the absence of evidence of the genuineness of the bill of sale, he was entitled to no benefits growing out of its contents. The court, therefore, rightly excluded evidence of its contents.

III. The evidence tended to show that Skiles, when the mortgage was executed, was in possession of the goods under a contract giving him the right of purchasing the goods at prices indicated. But there was no evidence that he ever exercised the option given him to buy the goods, and plaintiff testifies that he remained the owner. Upon this testimony the court rightly overruled a motion of defendant that the jury be required to return a verdict for defendant.

IV. The defendant offered to prove that Skiles had paid a claim upon which defendant had brought an action by attachment. This fact defendant claims was a reason inducing him to think Skiles owned the property. He was permitted to show that he did so think. It was not either necessary or competent to go into an investigation as to his reasons for his thoughts and belief. The evidence offered was therefore rightly rejected.

2. CHATTEL
mortgage:
mortgagor's
ownership:
evidence.

3. —: —:
evidence of
mortgagee's
belief.

V. Plaintiff was asked, on his examination for defendant, what recommendation or certificate of character he, or another with his knowledge and consent, had given Skiles. An objection to the question was rightly sustained, for the reason, if no other existed, that defendant did not show, or propose to show, that he knew of or acted upon this recommendation.

4. EVIDENCE:
recommenda-
tion to credit:
when imma-
terial.

VI. The contract under which Skiles held the goods provides, among other things, that he shall sell them; that expenses shall be paid; and then it proceeds with this language: "Then Robert J. Skiles to have all that the business makes above expenses, up to forty dollars each month, provided the business makes so much, and all above the expenses and the forty dollars each month, if any, should be equally divided,—T. N. Bray one-half, Robert J. Skiles the remaining half, and so on, to such time as the party of the first part [Bray] may choose." The court, in an instruction which is complained of by defendant, directed the jury that plaintiff had the right to terminate the contract at any time. The instruction is apparently correct, being in accord with the plain language of the contract. These considerations dispose of all questions in the case. The judgment of the district court is

5. CONTRACT:
right to
terminate:
sale of goods
and division
of profits.

AFFIRMED.

CURRIER V. MUELLER *et al.*

Appeal: PROCEEDINGS FOR CONTEMPT: JURISDICTION. Under section 8499 of the Code, providing that "no appeal lies from an order to punish for a contempt, but the proceedings may, in a proper case, be taken to a higher court for revision by *certiorari*," held that this court has no jurisdiction, on appeal, to review an order discharging the defendant in the proceeding for contempt in violating an injunction, though issued under the statutes for the suppression of intemperance; but it would *seem* that it has jurisdiction, upon *certiorari*, to review the order made in such a case, whether it be for the punishment or the discharge of the defendant, when such review is demanded either by public or private interest. (Compare *Congregational Church v. City of Muscatine*, 2 Iowa, 69, and *Lindsay v. District Court*, 75 Iowa, 509.)

Currier v. Mueller.

Appeal from Lee District Court.—HON. J. M. CASEY,
Judge.

FILED, FEBRUARY 4, 1890.

PROCEEDING to punish for contempt. From a judgment discharging defendants the plaintiff appeals.

Newman & Blake, for appellant.

S. M. Casey and *T. H. Johnson*, for appellees

GRANGER, J.—This is a proceeding to punish for the violation of an injunction issued under the law for the suppression of intemperance. At the hearing in the district court the defendants were discharged; and, the plaintiff having brought this appeal, a motion is made to dismiss on the ground that this court has no jurisdiction in such cases on appeal.

Disconnected entirely from its relation to the law regulating the sale of intoxicating liquors, the question before us seems to have been fully settled by prior adjudication. Speaking of the question thus disconnected, we may look to the case of *Congregational Church v. City of Muscatine*, 2 Iowa, 69. As in this case, that was a proceeding to punish for a contempt in disobeying an injunction; and the case is further like this in the fact that the party charged with contempt was on the hearing discharged, and the appeal was from the order of discharge. In that case the law, both common and statutory, as to proceedings for contempt, received consideration; and, under statutory provisions as to proceeding for contempt like those at the present time, the right of appeal was denied. The Code of 1851 contains this: "Sec. 1606. No appeal lies to an order to punish for a contempt; but the proceedings may, in proper cases, be taken to a higher court for revision by *certiorari*." That section is identical with the present Code, section 3499, except the words "to an order"

read now "from an order." In that case the court cited to some extent, and reviewed, the general statutes regulating appeals, both civil and criminal, and announced the conclusion of the court in these words: "In any view of the case in which we have been able to see it, we are constrained to the conclusion that the special provision contained in section 1606, denying an appeal from an order to punish for contempt, is controlling of the general provisions regulating appeals, and extends to contempts by a disobedience of an injunction as well as of other process." A significant feature of the holding is that it makes the section (1606) "controlling of the general provisions of the statutes regulating appeals," and no subsequent legislation has attempted to change its force. There have since been changes in the general statutes governing appeals, but nothing which is expressly or by implication designed to affect the statute (section 3499) providing for a review of proceedings for contempt. In the case of *Lindsay v. District Court*, 75 Iowa, 509, the rule as announced in the case cited received strong support. That was a case, also, where the district court refused to punish for the contempt charged, and the case was brought here on *certiorari*; and the precise point urged was that the court has "no authority for reviewing on *certiorari* the action of the district court in refusing to punish an alleged contempt against the authority of the court." It should be stated that in the *Lindsay* case the refusal of the court to punish was based on its holding that it had no authority to inquire into facts alleged as a contempt, which this court held to be an error. But still the fact is that there was no "order to punish," from which the appeal could be taken; and the court announced its conclusion in these words: "As no appeal lies, the judgment of the district court must be reviewed in a *certiorari* proceeding, if it can be done at all. The proper construction of the statute, we think, is that the action of the court may, in a proper case, be so reviewed; that is, the proceeding may be reviewed, whether the

Winkleman v. Winkleman.

defendant has or has not been punished, in all cases where a substantial right, either public or private, is involved, which can only be protected or enforced by the proceeding in contempt." This latter case seems to involve the precise point in this case, barring this difference as to the facts: In the *Lindsay case* the punishment was refused by the court's holding that, because of an appeal and bond filed, it could not inquire into the facts. In this case the refusal was because of a want of testimony to show the fact of contempt. The rule announced, however, in the *Lindsay case* seems broad enough to allow a review on *certiorari* when demanded either by public or private interest; in this respect it seems to answer the query in the concluding paragraph of the opinion in *First Congregational Church v. City of Muscatine*, 2 Iowa, 69. Appellant attaches some importance to the peculiar language of the liquor law, providing that the punishment shall be "as for contempt;" but inasmuch as the *Lindsay case* is one of the same class of cases, and so definitely announces the rule as far as such an argument requires it, we deem it unimportant to pursue the consideration further. Our views lead us to sustain the motion to dismiss the appeal.

APPEAL DISMISSED.

WINKLEMAN V. WINKLEMAN *et al.*

1. **Practice: FILING: PLEADINGS: ENTRY IN APPEARANCE DOCKET.** A pleading is not filed so as to authorize its consideration as a part of the record, unless a memorandum of its filing is entered in the appearance docket. (See *Nickson v. Blair*, 59 Iowa, 531.)
2. ———: ———: ———: **TRANSFER FROM PROBATE TO EQUITY DOCKET: OBJECTION TOO LATE ON APPEAL.** Where a cause was begun in probate in the circuit court, and the pleadings were properly filed, and a memorandum thereof was entered in the probate appearance docket, and the cause was then transferred to the equity docket, and came into the district court by operation of law

79	319
87	330
79	319
103	104
79	319
111	364
79	319
123	550
79	319
127	137
79	319
131	527

Winkleman v. Winkleman.

upon the abolition of the circuit court, *held* that it was not necessary to refile the pleadings, and to enter a memorandum thereof in the appearance docket of the district court; moreover, that the question of the sufficiency of such filing could not be raised for the first time in this court.

3. **Homestead: CONVEYANCE: ORAL AGREEMENT FOLLOWED BY CHANGE OF POSSESSION: RESCISSION.** Where a father, with the consent of his wife, orally, and for a valuable consideration, gave to his son a tract of land which included the homestead, and the son took possession thereof and for a long time treated it in all respects as his own, and the transfer was regarded by all concerned as a completed transaction, except as to the legal title, which it was designed to perfect by means of the father's will, and a will was executed for that purpose, but after the son's death the father, by a codicil, revoked that part of his will, *held* that the equitable title was in the widow and heirs of the son, as against the executor of the father, who sought to sell it and to divide the proceeds under the terms of the codicil. (As to the transfer of the homestead by verbal agreement, compare *Drake v. Painter*, 77 Iowa, 781.)

Appeal from Mahaska District Court.—HON. J. K. JOHNSON, Judge.

FILED, FEBRUARY 4, 1890.

ACTION in equity for the adjudication of title to real estate. The facts are stated in the opinion.

John F. Lacey and *W. R. Lacey*, for appellant.

Blanchard & Preston, for appellees.

ROBINSON, J.—This action was originally a proceeding in probate to obtain an order for the sale of real estate. In August, 1886, the plaintiff, as executor of the estate of John Winkleman, Sr., deceased, filed in the proper court a petition which alleged the death of said Winkleman, testate, and that his will, which had been admitted to probate, directed the sale of the property described in the petition, and the distribution of the proceeds among his heirs. The property described comprises two tracts of land, which contain in the aggregate about fifty-one acres. Notice of the proceeding was given to William A., Thomas A., Thomas J., H. C., B. F. and Samuel Winkleman. The four defendants last named and the plaintiff are the sons,

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and the two defendants first named are the grandsons, of said John Winkleman, Sr. The grandsons are minors, and appear by guardian. On the seventh day of September, 1886, they filed an answer and cross-petition. In that they allege that they are the sons of John S. Winkleman, who was a son of their said grandfather, and is now deceased. They further allege in their original cross-petition, and amendments thereto, that they are the only heirs of their father; that he furnished a large portion of the money paid for the land in controversy; that he lived on and cultivated and improved it until his death; that he helped to farm other lands which belonged to his father, and helped to care for and support his father and his father's family until his own death; that in consideration of the money paid, and the labor and support furnished, as aforesaid, it was agreed between their father and grandfather that the latter should, by will or other means, transfer to their father the title to the premises in controversy; that, in pursuance of said agreement, their grandfather, at some time in the year 1874, did, by gift verbally expressed, transfer and convey to their father the premises in controversy, with the intent to vest him with the full title thereto; that their father accepted said transfer, and at once took possession of the property so transferred, with the knowledge and consent of his father, and caused the same to be staked off, and from that time occupied it until his death, and, with the knowledge of his father, made valuable improvements upon it, and paid the taxes thereon, leased it to other parties, and in all respects treated it as his own; that their grandfather, in furtherance of his said agreement, made a will, dated December 24, 1874, by which he devised said premises to their father; that their father died in the year 1877; and that thereafter their grandfather, being improperly influenced thereto, attempted to revoke said devise by means of a codicil, and devise said property to his other children. They ask that they may be decreed to own the property.

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Their mother, the widow of John S. Winkleman, filed a petition of intervention, in which she repeats substantially the averments of the cross-petition of her sons and asks that she and they be decreed to be the owners of the property in controversy. She is insane, and appears by guardian. A trial was had on the merits of the case, and a decree rendered in favor of the widow and sons of John S. Winkleman, deceased, adjudging them to be the absolute and unqualified owners of the property in controversy. The plaintiff and his brothers appeal.

I. After the arguments on the first appeal had been made, appellants applied to the district court for a *nunc pro tunc* order, to the end that the records of that court might show that a pleading entitled, "Amended reply and answer to petition of intervention," was duly filed in that court. It was found by the court that the paper in question was placed with the files in the case some time in January, 1887, and that it was attached to the files of pleadings some time in that month, immediately preceding a paper which was filed the twelfth of that month; that it could not state whether it had ever been presented to the clerk for filing or not; that it was not marked "Filed," by the clerk, and no memorandum of its filing had ever been entered in the appearance docket; that it was prepared at the office of one of the attorneys in the case, at a time when depositions were being taken. The order prayed for was denied, and the applicants for the order appeal. It is agreed that the appeals be submitted together. It was held in *Nickson v. Blair*, 59 Iowa, 531, that the failure of the clerk to make the required entry in the appearance docket was fatal, even though the paper had been lodged in his office, and marked "Filed." Following that rule, the action of the district court in overruling the motion must be held to have been correct. The paper had not been filed in fact, within the meaning of the law; and the records should not have been made to show that it had.

1. PRACTICE:
filing plead-
ings: entry in
appearance
docket.

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II. On the day they filed their cross-petition, defendants William A. and Thomas A. Winkleman filed a motion to transfer the cause to the equity docket. It was sustained on the tenth day of September, 1886; but no record of that order was made until the nineteenth day of January, 1887, when the proper record was made by means of a *nunc pro tunc* order. Some of the pleadings were filed as in probate, and a memorandum thereof was made in the probate appearance docket; and no entry thereof was thereafter made in the appearance docket of the district court. Appellants contend that such papers were not properly filed. The proceedings in probate were commenced in the circuit court, and while pending therein the filing of papers was properly noted in the probate appearance docket. The circuit court ceased to exist on the first day of January, 1887; and the district court succeeded to its jurisdiction, and was given authority over its records. We do not think it was necessary to refile papers which had once been properly filed, and memoranda of such filings duly made in the proper appearance docket. Moreover, the sufficiency of the filings now questioned by appellants is raised for the first time in this court. No objection was made to them, nor to the pleadings in question, in the district court; but they were treated in all respects as duly filed, and a part of the records in the case. In view of the fact that all had once been filed, and a record thereof made, appellants should not now be heard to question that they have been duly made of record.

III. The evidence submitted is voluminous and conflicting; but we are of the opinion that the facts of the case, either admitted or proven by a preponderance of the evidence, are substantially as follows: About the year 1855, John Winkleman, Sr., came to Iowa, and soon afterwards purchased the land in controversy, with other lands. His six sons, the youngest of whom was about sixteen years of age, came with him.

2. —:—:
—: transfer
from probate
to equity
docket: objec-
tion too late
on appeal.

3. HOMESTEAD:
conveyance:
oral agree-
ment followed
by change of
possession:
rescission.

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All but one lived with him until they were married, but all but John S. left him within seven or eight years after they came to Iowa. John S. was about twenty-four years old when the land in question was purchased, and furnished nearly one hundred and twenty dollars towards its purchase. He lived on the farm with his father until his death, in 1877, and helped to carry it on. He married appellee Mary M. Winkleman in the year 1866, and by her had two sons, her co-appellees. In October, 1874, John Winkleman, Sr., assisted in platting certain land, including the land in controversy. The plat described this land as the property of John Winkleman, Jr., and was recorded. John S. was sometimes known as "John, Jr." He at once took possession of the property, and made substantial and permanent improvements thereon. After that time the property was treated as belonging to him. It was assessed in his name, with the knowledge and by the wish of his father; and he paid the taxes thereon in his own name from year to year. He was frequently declared to be the owner of the property by his father, and his brothers understood that it belonged to him. His father had divided a large portion of his property among his sons by way of advancements, and had given him but little. The land in question would have made him but a fair share of his father's estate. It was treated in all respects as belonging to him. On the twenty-fourth day of December, 1874, his father executed a will which devised to him this land. After his death, trouble arose between his father and the administratrix of his estate and the guardian of his children and litigation ensued. After that trouble, and in November, 1879, John Winkleman, Sr., executed a codicil which in terms revoked so much of his former will as devised the property in question to John S., and directed that it be sold, and the proceeds be divided among his five sons, excepting ten dollars, which was to be divided between John S.'s children. It is insisted by appellant that the evidence shows at most but an

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intent on the part of their father to devise the land to their brother; and that nothing he said or did had any contractual effect. There is much in the record to sustain that claim; but, taken as a whole, the evidence satisfies us that the father in fact transferred the land to his son; that the transfer was accepted, and in all respects treated as completed, excepting as to the legal title; and that it was designed to perfect that by means of the will. It appears to us that no other conclusion would be equitable.

IV. It is insisted that the land in question was the homestead of John Winkleman, Sr., and that it was not, and could not have been, alienated, for the reason that no joint instrument, concurred in and signed by himself and wife, was executed, as required by section 1990 of the Code. As the record now stands that defense is not pleaded. It was set up in the paper which appellants attempted unsuccessfully to have made a part of the record. It is contended that the want of a valid conveyance may be shown under the general issue. If it be conceded, for the purposes of this appeal, that such is the case, still we think the appellants should fail. The evidence in regard to the homestead character of the premises is not clear. The homestead right could not, in any event have attached to all of both tracts. No effort to show that they included a homestead seems to have been made in the court below. The evidence as to that seems to have been incidental, and we are satisfied that the defense now urged was not relied upon in the court below. Moreover, the evidence shows that both parents of John S. knew of, and consented to, the transfer. If their homestead was included, they abandoned it. Both parents survived the son, but that fact gave them no right to rescind a transfer which had taken effect during the lifetime of the son. If their homestead was included in the premises in controversy, the case is in some respect like that of *Drake v. Painter*, 77 Iowa, 731; in which it was held that a verbal agreement for

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the transfer of the homestead, assented to by both husband and wife, followed by a change of possession and a performance of the agreement, operated to transfer the equitable title. The decree of the district court involved in the first appeal, and its ruling involved in the second, are

AFFIRMED.

THE STATE V. WILLIS.

Criminal Law : COSTS : MILEAGE OF DEFENDANT'S VOLUNTARY WITNESSES. Defendant's father, at request of defendant's counsel, came from Dakota to Iowa to testify, and he did testify, in the defendant's behalf, on the trial of a criminal prosecution against defendant. He was not subpoenaed, but his name was included in the list of witnesses which the defendant was authorized to subpoena, by an order of the court made under chapter 207, Laws of 1880. *Held* that he was entitled, upon defendant's acquittal, to have costs taxed up against the county for his daily attendance, but to nothing for mileage. (*Westfall v. Madison County*, 62 Iowa, 427, distinguished.)

Appeal from Hardin District Court.—HON. S. M. WEAVER, Judge.

FILED, FEBRUARY 4, 1890.

THIS case is submitted upon certificate of the judge trying the same that, a verdict of not guilty having been returned, the cause came on for hearing, on the application of defendant, for the allowance of witness fees of J. P. Willis, witness for the defendant. "That such cause and question involves the determination of a question of law upon which it is desirable to have the opinion of the supreme court, as follows: The witness J. P. Willis is the father of the defendant, and resides at Woonsocket, Dakota, a distance of three hundred and twenty miles from the court where the cause was tried. He was not subpoenaed, but came to court on request of defendant's counsel, as a witness, from his

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home, though his name was included in the order for the witnesses for the defendant. He attended court as a witness two days, and testified in the cause for the defendant. (1) Was the witness entitled to have costs taxed up against the county as mileage, for the whole distance of three hundred and twenty miles from his home, with his two days' attendance at the court, amounting to \$34.50, as claimed by the defendant? (2) Or was the witness entitled to have costs taxed up against the county for his two days' attendance at the court and one mile, as a witness picked up in the court, he having come to court without being subpoenaed, as claimed by the state, which costs amount to \$2.60. (3) Or was the witness entitled to have taxed up, as costs to the county, two days' attendance and mileage from the state line of Iowa, a distance of two hundred and forty miles only, and amounting to \$26.50, as the court ordered; the costs to be taxed for the witness, against the county, on the application of the defendant? To which order and judgment of the court both the state and the defendant do now duly except; all of which is done in open court, at the time the order and judgment of the court is rendered."

John Y. Stone, Attorney General, and *H. L. Huff*, County Attorney, for the State.

Albrook & Hardin and *John S. Roberts*, for appellee.

GIVEN, J.—I. The single question to be determined is whether the witness J. P. Willis is entitled to mileage for more than one mile; and, if so, whether from his home in Dakota, or from the state line. Code, section 3814 provides a fee for each day's attendance, and "mileage for actual travel per mile, each way, five cents," and that, "in criminal cases, where the defendant is adjudged not guilty, the fees above provided for attending a district court or justice's court shall be paid by the county upon a certificate of the clerk or justice." Some such provision is necessary to secure to parties

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accused of crime a fair trial, and to witnesses who are compelled to attend and testify compensation for the time spent and expenses incurred in obeying the process of the court. It is a notorious fact that while the law stood thus these provisions were greatly abused; witnesses being subpoenaed upon the slightest pretext, and without knowing whether they were material or not, and in some cases defenses even going so far as to try to deter prosecution, and force a dismissal, by subpoenaing an extraordinary number of witnesses, and creating unnecessary expenses. To prevent such abuses, the Eighteenth General Assembly enacted, as found in Laws of 1880, chapter 207 (section 5095, McClain's Code), that "in no criminal case shall witnesses for the defense be subpoenaed at the expense of the county, except upon order of the court or judge before whom the case is pending; then only upon a satisfactory showing that the witnesses are material and necessary for the defense." While some discretion is necessarily left to the courts as to the taxation of costs, including witness fees, this discretion should not be exercised so as to encourage or open the way to abuses. Fees and mileage are paid to witnesses because, in obedience to the command of the court, they have given their time and incurred expenses in attendance and travel. It is clearly not the purpose of the law to compensate for time and travel beyond that given in obedience to the command of the court. A witness attending under subpoena gets pay for miles actually traveled, and days of attendance only. Persons present in court may be called as witnesses without subpoena, and from the time of being so called are as much subject to the order of the court as if they had been subpoenaed, and are entitled to *per diem* for each day they are in attendance under orders of the court; but such witnesses are not entitled to any mileage, for they have not actually traveled even a fraction of a mile in obedience to the command of the court. Of course, witnesses called in open court, without subpoena, have the same right, in proper

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cases, to demand their fees that they would have had upon being served with subpoena.

Applying this view of the law to this case, it would follow that the witness J. P. Willis is not entitled to any mileage. It must be noticed, however, that the court had made an order for a subpoena of defendant's witnesses, including the said J. P. Willis, and that he had attended at request of defendant's attorney, without subpoena. The order of the court granting the defendant authority to subpoena witnesses is not in any sense an order or request of the court to such witnesses to attend. It does occur that, after taking such orders, it is ascertained that witnesses named therein are not material, and therefore not subpoenaed. It will not do to say that any witness, knowing himself to be named in such order, may by reason thereof attend and recover the same fees and mileage as if he had been subpoenaed. The request of counsel, based upon the order, was in no sense a command or request from the court.

None of the cases heretofore presented to this court involved the precise question under consideration, and all of them except *Westfall v. Madison Co.*, 62 Iowa, 427, are so entirely different as not to be in point. In *Westfall v. Madison Co.*, the witness was served with subpoena at Pittsburgh, Pennsylvania, to appear, and did appear, as a witness on behalf of the state, and this court held that he was entitled to mileage from Pittsburgh for the reason that, when one person performs services at the request of another, he is entitled to compensation from the latter; that the subpoena was a request from the state for the witness to travel and attend, which request was justified by the fact that the state could not avail itself of the testimony of this witness except by his personal presence. The court says: "We think public policy, and the due and proper administration of the criminal law, demand that such should be the rule. * * * To prevent failures of justice, the attendance of witnesses in such cases should,

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at least, be so far encouraged as to require the state and counties to pay them a reasonable compensation when they voluntarily, but at the request of the state, come here for the purpose of testifying on the part of the state in criminal actions." The reason for this ruling is entirely wanting in the case under consideration. In that, the state could not avail itself of the testimony of the witness, except by his personal presence; in this, the defendant could have availed himself of the testimony of his father by deposition. It is argued that his personal presence was preferable. It is true that the manner and appearance of the witness sometimes adds weight to the testimony that is lost when presented through deposition; but it is also true that whatever may be in appearance and manner to detract from the weight of the testimony is gained by presenting it in deposition. Our conclusion is that, in such a case as that stated in the certificate of the trial judge, the witness is entitled to have costs taxed against the county for the days of his attendance only, and that he is not entitled to any mileage. The judgment of the district court is therefore

REVERSED.

THE STATE V. BOYER.

Gambling: EVIDENCE TO CONVICT. Where, on an information for gambling, the evidence showed that the officer who arrested defendant went to a room in which language used in the game of poker, and the rattling of poker-chips and cards was heard, and, upon demanding admission and being refused, he forced an entrance just in time to see one man escaping from a window, and found upon a table in the room poker-chips and cards, used in the game of poker, and found defendant in an adjoining hall, which he could enter from the street only from the room in question, and defendant attempted no explanation of his presence there, *held* that it was sufficient to sustain a conviction.

Appeal from Davis District Court. — HON. H. C. TRAVERSE, Judge.

FILED, FEBRUARY 5, 1890.

79	330
94	710

79	330
128	135

DEFENDANT was tried without a jury, and convicted upon an information charging him with the crime of gambling, brought upon appeal from a justice of the peace.

S. S. Carruthers and Payne & Eichelberger, for appellant.

John Y. Stone, Attorney General, and *George T. Sowers*, County Attorney, for the State.

BECK, J.—I. Counsel for defendant insist that the evidence is not sufficient to support the conviction of defendant, in that it fails to establish the fact that defendant is guilty of the offense charged against him. The evidence shows that the officer who arrested defendants went to a room in which voices were heard, using language employed in the game of poker, and the rattling of chips used in the same game and cards were heard. The officer demanded admittance, and was refused, but he broke the door just in time to observe a part of the body of one man escaping out of the window. Poker-chips, and cards used in the game of poker, were found upon a table. Defendant was found in an adjoining hall, which he could not enter from the street without going through the room where the gaming appliances were found, and he could enter the hall through the window of that room. Other persons were found in the adjoining room, connected with the gaming room by the window through which the escape above stated was made. That there was gambling in the room when the officer demanded admittance there can be no doubt. The *corpus delicti* is established beyond a doubt. That defendant was present when the crime was committed there can be no doubt. Not one word of evidence is offered by defendant, or any other person present, denying the crime, or tending to show that defendant was not a guilty party. Surely, when one is present at the commission of a crime, runs away when officers and

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others come to arrest the guilty party, and fails to offer one word of evidence explaining his presence and his flight, and showing that it all is consistent with innocence, evidence of such facts amply supports a judgment of conviction for the crime. Counsel think that "prejudice against the crime of gambling" secured the verdict. The same character and weight of evidence would, in every court in the land, be regarded amply sufficient to warrant the conviction of heinous offenses and the higher felonies.

II. One of the fugitives, arrested after the flight from the gambling room, testified that he made certain statements before the grand jury when he was a witness there. This evidence is now made the ground of objection. Assuming that it is irrelevant and immaterial, no prejudice could possibly have resulted to defendant therefrom. It is not, therefore, a sufficient ground for reversing the case. But no objection was made to the admission of the evidence. It cannot be first complained of in this court. The judgment of the district court is

AFFIRMED.

MARSH & CO. V. THE CHICAGO, ROCK ISLAND AND
PACIFIC RAILWAY COMPANY.

1. **Pleading: CONTRACT WITH FIRM: PARTIES.** Plaintiff, a copartnership, sued on a contract alleged to have been made with it by the defendant. In an amended petition plaintiff alleged that the contract was made by one B. for the benefit of himself, M., and another person named B., and the evidence showed that these three persons were the partners constituting the firm of M. & Co., plaintiff. *Held* that the original and amended petitions showed that the contract was made for the benefit of the plaintiff firm, and that it could maintain an action thereon in the firm name. (See Code, sec. 2543, and cases cited in opinion.)
2. **Contract: CONDITION: PLEADING AND PROOF.** In an action upon a contract to pay rebates upon the breaking of a pool between defendant and other railway companies, it was not necessary for

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plaintiff to allege or prove the parties to the pool nor the terms thereof, but it was sufficient, to sustain a verdict for plaintiff, to introduce evidence tending to show the existence of the pool and the breaking thereof.

8. **Railroads: POOLS: POWER OF AGENT TO CONTRACT FOR REBATES.** A contract to pay a rebate on stock shipped over a certain line of road is but a contract for a special rate, and evidence that defendant's stock-agent had made contracts for special rates which the company had recognized and performed, was evidence of his authority to contract for rebates on future shipments, notwithstanding the existence of a pool; for it is the pool which makes it necessary to contract for rebates rather than for special rates, and such contracts necessarily relate to the future.
4. **Continuance: AMENDMENT OF PETITION.** The court in this case properly allowed plaintiffs to file an amendment to their petition, stating more fully the form and substance of the contract sued on, but leaving their claim unchanged. (Code, secs. 2686, 2689.) And since by the original petition defendant was sufficiently advised of plaintiffs' claim to make full preparation for its defense, the filing of the amendment was no ground for a continuance.

Appeal from Appanoose District Court.—HON. DELL STUART, Judge.

FILED, FEBRUARY 5, 1890.

ACTION to recover upon a contract whereby defendant agreed to pay to plaintiffs rebates at the rate of \$19.50 per car upon twenty-nine carloads of live stock shipped by plaintiffs over defendant's railroad. There was a judgment upon a verdict for plaintiffs. Defendant appeals. The cause has before been in this court. See 75 Iowa, 361.

T. S. Wright and Tannehill, Vermilion & Haynes,
for appellant.

T. M. Fee and George D. Porter, for appellees.

BECK, J.—I. In view of questions arising in argument which involve the case as made by the allegations of the petition and amended petition, it is necessary to set out these pleadings in full. The abstract

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shows that the petition alleges that plaintiffs, in the language of the abstract, "are a copartnership, and were engaged in shipping live stock in the years of 1886-87, and that the defendant is a common carrier; that, in the fore part of the year 1886, defendant, through its duly authorized agent, one Conklin, made a verbal contract with the plaintiffs that on all shipments made by the plaintiffs from Seymour, Iowa, to Chicago, of live stock, the defendant would grant the plaintiffs, and pay them, the sum of \$19.50 a carload, as a rebate on the regular schedule price of fifty-two dollars per car; that during the year 1886 and January, 1887, the plaintiffs shipped from Seymour, Iowa, to Chicago, Illinois, over the line of defendant's railway, twenty-nine carloads of live stock; that there was deducted from the selling price of said stock, and paid to defendant, the sum of fifty-two dollars a car; that the defendant has failed to pay said rebate to the plaintiffs, as he promised to do; that said shipments were made over said defendant's railway, relying on said agreement as to the amount of said rebate and on defendant's promise to pay; that no part has been paid; and that there is justly due thereon the sum of five hundred and sixty-five and fifty-one-hundredths dollars." After the evidence had been submitted, the plaintiffs, for the purpose of conforming the allegations of the petition to the evidence, filed an amendment to the petition, in the following language: "That in the month of February, 1886, Conklin, as alleged in plaintiffs' petition, contracted with the plaintiffs as therein stated; that H. F. Babbit, Harlan Marsh and J. R. Babbit had been shippers for years over the defendant's road, and the said H. F. Babbit applied to Conklin for rates as to the rebate that would be allowed them, and stated that they had some stock on hand, and contemplated buying more, and wanted rates, and that said Conklin stated that the defendant, with other competing lines, had agreed to maintain schedule rates, or had 'pooled,' but that the said agreement was liable to be terminated at

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any time; that said Conklin desired the said Babbits and Marsh not to ship over any other lines, and if the 'pool busted,' or agreement was terminated, they could have the rates that H. F. Babbit and J. R. Babbit had been shipping under heretofore; that if there was any offer of any rates below the schedule price, or cut in the schedule rates, that they (Babbits and Marsh) would ship at their old rates, which was a schedule rate of fifty-two dollars per car, less \$19.50 rebate to be refunded; that said Conklin said that it was immaterial in whose name the stock was shipped; that said 'pool was busted;' that other companies offered special rates to plaintiffs and that the agreement was at an end; that defendant gave 'cut rates,' and that the twenty-nine cars of live stock were shipped after the contingency had happened, relying on the offer of the defendant; that said Conklin agreed, if any of said competing lines should offer any special rates, or there should be any cut from the schedule rates, that for them to ship, and not leave the defendant's road, but that they should have the old customary rates, which was \$19.50 per car rebate to them from the schedule rates; that this contract was made for the benefit of the said Babbits and Marsh, and stock was shipped under the name of Marsh, or Harlan, or H. Marsh, but said contract to the benefit for, and was for the benefit of, all; that said agreed maintenance of rates or pool did not last longer than March 1, 1886, and the said 'pool or agreement' failed and terminated before any shipments, and this fact was well known to plaintiffs at the time the shipments were made by plaintiff. Plaintiffs ask for judgment as prayed in the original and amended petition."

II. Counsel for defendant assign ninety-four errors upon the record before us. They consider but a very small number of the alleged errors, making but five points as grounds for reversing the judgment of the court below. We are required to consider no errors assigned or objections made to the judgment of the court below, except those argued by counsel. All others

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demand from us no attention. We will discuss the objections made by counsel in the order of their presentation in the printed argument of defendant.

It is first insisted that plaintiffs are not entitled to recover under the contract set out in the amended petition, for the reason that it is not alleged or shown that the contract was made with plaintiffs. The original petition alleges that the contract was made with plaintiffs. The amended petition shows that the contract was in fact made by H. F. Babbit, and recites the circumstances under which the contract was made, the negotiations leading thereto, and other pertinent matters. It alleges that the contract was made for the benefit of "the Babbits and Marsh." We discover no objections made to the pleadings on the ground that they do not show the individual names of the copartners. The evidence in this case shows without dispute that H. F. Babbit, Harlan Marsh, and J. R. Babbit—the Babbits and Marsh referred to—were the copartners. We notice that the opinion in the case when it was before here states that these parties were the copartners of the firm of Marsh & Co. The petitions, original and amended, show that the contract was made for the benefit of plaintiffs, Marsh & Co. They may maintain an action thereon without joining any other party. Code, sec. 2543; *Rice, v. Savery*, 22 Iowa, 470; *Roberts v. Corbin*, 26 Iowa, 316. The case, both upon the pleadings and evidence, is one where a copartner enters into a contract for the firm which, by action, it is asking to enforce.

III. It is next insisted that the contract alleged in the amendment has not been proven. This position seems to be based upon the alleged fact that it is neither alleged nor proved what railroad companies were in the pool. There was surely proof upon that point. The contract, as is shown by the evidence, is based upon the existence of the pool. It was made because there was a pool. Surely the plaintiffs cannot be expected to show the terms of

1. PLEADING:
contract with
firm: parties.

2. CONTRACT:
condition:
pleading and
proof.

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the pool, or the parties thereto. It is sufficient to show that a pool existed; and it cannot be said that there was such an absence of evidence upon that point as to require the judgment of the court below to be reversed.

IV. It is also insisted that the evidence fails to show that the pool was broken, or, in the language of the petition, "the pool was busted." There is evidence tending to show that defendant and competing companies had offered special or cut rates, which, under the agreement, entitled plaintiffs to receive the rebate. It cannot be said that there is such an absence of evidence on this branch of the case as to demand another trial. We are not to inquire as to the preponderance or weight of the evidence, but only to determine whether there was sufficient evidence in support of the verdict to negative the claim that it was the result of passion or prejudice.

V. It is next insisted that the evidence fails to show that the agent with whom the contract is alleged to have been made had authority to make it. The evidence tended to show that stock agents of defendant had made contracts for rates which were recognized and performed by defendant; that Conklin, with whom the contract was made, was a stock agent. Counsel insist that this evidence fails to establish Conklin's authority to make a contract for a rebate, for the reason that it does not show that rebates were made by such agents, and that when special rates were given it is not shown that there were no arrangements to maintain rates, or, as we understand the position, there was no evidence showing that there was at the time a pool. A contract for a rebate is in effect a contract for a special rate. It is but a matter of making a special rate. The necessity for this method arises in order to enable the company making the rebate to conceal the transaction from other companies with whom they had agreed to maintain rates. Therefore a contract for a rebate is made under authority to make special rates.

3. RAILROADS:
pool: power
of agent to
contract for
rebates.

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VI. But it is said, in effect, that the authority to make rebates must be shown when a pool exists. But the very fact of rebates being made—a method to conceal special rates from competitors—implies the existence at the time of pools to which the company is a party. If there were no pool, there would be no rebate—only special rates.

VII. It is urged that there was no evidence tending to show that a stock agent had ever arranged for rebates for the future. The contract for special rates or for rebates, of necessity, relate to the future—especially when it pertains to more than one, or a series of shipments. In the case before us the plaintiffs were about to ship two carloads. The shipment was not to be made immediately, but as they were ready. It was understood they were to be made as soon as the stock should be brought to the station. The contract pertained to other shipments as the business of plaintiffs required them to be made. Now, it is evident that any arrangement by which rebates were to be made, if it extended to the current business of the shipper, must of necessity pertain to the future. As we have seen, rebates are made, when pools exist, to take the place of special rates; and, if arrangements therefor are accommodated to the business of the shipper, they of necessity must extend to the future.

VIII. In our opinion, the court below rightly permitted the amended petition to be filed. It will be readily seen that it did not change the claim. It simply stated the form and substance of the contract more fully, leaving the claim of plaintiffs unchanged. It was therefore authorized under our liberal statutes. Code, secs. 2686, 2689. As the claim was not changed, the character and extent of defendant's liability, as set out in the petition, was not changed. No reason, therefore, existed to support its application for a continuance. It will be observed that the original petition alleges that the contract was made with Conklin. No

4. CONTINU-
ANCE: amend-
ment of peti-
tion.

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change as to this allegation is made in the amendment. In our opinion, the defendant, by the original petition, was sufficiently informed of the nature of plaintiffs' claim to direct it in the preparation of its defense. The defendant was not entitled to a continuance. In our opinion, the judgment of the district court ought to be

AFFIRMED.

STEELE & SON V. THE SIOUX VALLEY BANK.

1. **Vendor and Purchaser: QUITCLAIM DEED: PRIOR EQUITIES: NOTICE PRESUMED.** One who takes a mere quitclaim deed for real estate is conclusively presumed to have notice of prior equities, and takes subject thereto. And so an unrecorded bond for a deed takes precedence of a subsequent quitclaim deed, though the deed is based upon a valuable consideration and is taken without actual notice of the bond. Section 1941 of the Code, which provides that "no instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration, without notice, unless recorded," etc., does not apply, because the law presumes notice on the part of the grantee in a quitclaim deed. (See opinion for cases followed. *Pettingill v. Devin*, 85 Iowa, 853, overruled.)
2. **Dower: RELEASE OF: MISUNDERSTANDING.** A married woman who joins her husband in the execution of a bond for a deed, given in fact to secure a debt, cannot afterwards claim dower in the land upon a foreclosure of the bond on the ground that she supposed the bond to be made in pursuance of an actual sale.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, FEBRUARY 5, 1890.

THE issues involve a question of the priority of the liens of the respective parties; the necessary facts as to the liens of each being as follows: One B. F. Lauber, being the owner of two hundred and forty acres of land, was indebted to the plaintiffs in the sum of forty-seven hundred dollars, and, for the purpose of securing the

79	339
85	282
79	336
91	244
79	339
95	67
79	339
113	662
79	339
114	125
79	339
116	688

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debt, Lauber made to the plaintiffs a bond for a deed of the premises in question on the eighth day of June, 1887. This bond was not recorded. Lauber, being also indebted to the defendant in the sum of five thousand dollars, made to it a quitclaim deed of the same premises, June 14, 1887, to secure the debt. The defendant, when it received the deed, had no actual knowledge of the bond held by the plaintiffs. The bond of Lauber to the plaintiffs was placed on record June 25, 1887, prior to which time Lauber had absconded, and was insolvent. These facts are sufficient to present the main question in the case. The district court gave judgment for the plaintiffs, from which the defendant appeals.

Hubbard, Spalding & Taylor, for appellant.

E. C. Herrick and Marsh & Henderson, for appellees.

CHURCH, J.—I. It will be observed that the question is fairly presented as to the effect of a quitclaim deed given for a consideration, without actual notice of, and, after the execution and delivery of, an unrecorded bond for a deed for value. Counsel for appellant commence their argument with this statement: "The case here is one exactly parallel to the case of *Pettingill v. Devin*, 35 Iowa, 353;" and we think the statement true. Appellees do not, as we understand, controvert it, but urge that the *Pettingill* case has been repeatedly overruled, and is no longer the law of the state. The arguments in the case are mainly devoted to the question of how the case of *Pettingill v. Devin* is affected by subsequent rulings. It may be said that the case is nowhere in terms overruled. As to the necessary or legal effect of other decisions upon it, we must inquire.

A reference to the *Pettingill* case will show how nearly the facts of the two cases are alike as to the

1. VENDOR and purchaser: quitclaim deed: prior equities: notice presumed.

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particular question involved. Coffin held an unrecorded bond, of which the defendant Devin had no actual notice. Devin afterwards obtained a quitclaim deed, for which he paid a consideration. It was held that the quitclaim deed took precedence of the unrecorded bond. The holding was based largely on section 2220 of the Revision of 1860, as follows: "No instrument affecting real estate is of any validity against subsequent purchasers, for a valuable consideration, without notice, unless recorded in the office of the recorder of deeds of the county in which the land lies, as hereinafter provided." Section 1941 of the Code is identical in its language. This court has repeatedly held that the holder of a quitclaim deed takes it charged with knowledge of prior equities; that he is not an innocent holder.

To a proper disposition of the question before us, it is important that we consider, to some extent, at least, the particular facts under which these holdings were announced; and we think it may be done in a general way, without referring to each particular case. Appellant, recognizing the fact that, including the *Pettingill* case, two rules have been announced as to the effect of a quitclaim deed, makes this statement: "The cases decided by this court, in which the broad doctrine is announced that a purchaser taking a quitclaim takes subject to equities, are all of them based upon one of two thoughts,—either all the right, title and interest of the person executing the quitclaim have been previously conveyed, so that he has no right, title and interest to convey, or some equity not at all dependent upon a written instrument, or the record thereof, has arisen against the land." We do not see how the fact that the grantor in the quitclaim deed had, before its execution, disposed of all his interest in the land could make or justify a different rule; and we find no intimation in any of the cases that that fact is made the basis for a distinction. Under such a rule, if A., being the owner of land, should dispose of it to B.,

and, without actual or constructive notice, should quitclaim to C., the latter would, by operation of law, be charged with notice of B.'s interest. Now, if instead of conveying the entire estate to B., A should convey an undivided one-half, and a quitclaim should be made to C., with the facts as before stated as to notice, C. could take the land discharged of B.'s equities. Before such a distinction is maintained, it should have the support of authority or strong reason, and we discover neither. The latter part of appellant's statement, that the cases are based on "some equity not at all dependent upon a written instrument, or the record thereof," has support in some of the cases; and, we think, if the distinction is to be maintained, it must be on that theory.

In the case of *Springer v. Bartle*, 46 Iowa, 690, the court, having under consideration the protection afforded by a quitclaim deed as against the fraudulent title of the grantor, used this language: "Ide quitclaimed to the defendant all his right, title and interest in and to the land in controversy. It was held in *Watson v. Phelps* (40 Iowa, 482), heretofore cited, that 'one holding under such a deed is not to be regarded as a *bona-fide* purchaser without notice of equities held by others.' In an argument evidencing much ability, we are asked to overrule this decision; and counsel in their zeal claim that this court has held otherwise in *Pettingill v. Devin*, 35 Iowa, 353. This is a grave mistake. No such point was presented in that case. The point decided was that, under the recording act, a person holding under a quitclaim deed acquired a prior right to one claiming under a bond for a deed, of which he did not have notice. In that case the party executing the quitclaim deed owned the legal title; but in the case at bar, Ide's title was tainted with fraud, against which the quitclaim deed did not protect the plaintiff. Besides which, the statute expressly provides that such a purchaser as Devin is protected against a prior unrecorded conveyance. Code, sec. 1941. The doctrine announced

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in *Watson v. Phelps* was approved in *Smith v. Dunton*, 42 Iowa, 48; *Light v. West*, 42 Iowa, 138; and *Besore v. Dosh*, 43 Iowa, 211. These decisions meet our approbation, and we are unwilling to take, at this late day, the time and space requisite to vindicate their correctness." In that case it will be seen that the equity as to which the quitclaim deed was held subject was not one that would have been manifest if all instruments of conveyance had been recorded. The cases of *Watson v. Phelps*, *Smith v. Dunton* and *Besore v. Dosh* are all ruled on facts of like legal import. The record of conveyances would not have given notice of the equities involved. The following cases sustain the same legal proposition: *Winkler v. Miller*, 54 Iowa, 476; *Ballou v. Lucas*, 59 Iowa, 24; *Kaiser v. Waggoner*, 59 Iowa, 41; *Laraway v. Larue*, 63 Iowa, 412; *Butler v. Barkley*, 67 Iowa, 491; *Bradley v. Cole*, 67 Iowa, 653.

There are, however, some cases where the facts are different, and where the equities urged as against a quitclaim deed would have been apparent from the recording of the instruments under which claims were made, but where they were not recorded. In the case of *Wightman v. Spofford*, 56 Iowa, 145, it must be taken for granted that the contracts and instruments there referred to were not recorded, as, if they were of record, the questions discussed could not have well arisen. The only equities in the case, as it was ruled, arose out of contracts and deeds of conveyance which might have been of record. There, Casaday, who owned the land and had given a contract of sale under which plaintiff indirectly claimed the title, afterwards gave to Robertson a quitclaim deed, by virtue of which Robertson claimed the title. The court, in disposing of Robertson's interest, used these words: "As he bases his title upon a quitclaim deed, he cannot be regarded as a purchaser without notice of plaintiff's equities." The facts of the case, so far as pertains to their legal significance, are not different from those of *Pettingill v. Devin*. In *Raymond v. Morrison*, 59

Iowa, 371, Wellington had conveyed the land by deed to Downey, whose deed was not recorded. Wellington afterwards quitclaimed to Varnum, and on the trial it was sought to be established that Varnum had knowledge to put him on inquiry as to the deed to Downey; but this court practically dismissed the inquiry as immaterial, holding that, as he held under a quitclaim deed, he could not be regarded as a good-faith purchaser. The same rule is expressed in the case of *Fogg v. Holcomb*, 64 Iowa, 621, where the controversy is based on muniments of title. It is said that one who holds by a quitclaim deed cannot be regarded as an innocent purchaser of the land for value. A very pointed case, upon a similar state of facts, is that of *Postel v. Palmer*, 71 Iowa, 157. Norton owned the land, and executed a conveyance to Brown in October, 1873, which conveyance was not recorded. On the thirty-first day of March, 1884, he conveyed the land to the plaintiff by quitclaim deed. There is no pretense of actual notice. The opinion says: "That conveyance, as we have stated, was a mere quitclaim; and by it plaintiff could acquire no right against outstanding equities which were valid as against Norton."

It thus appears that in four different cases, from 1881 to 1887, this court has held to a rule at variance with that of *Pettingill v. Devin*, and under facts which render the holdings inconsistent; and in effect they must overrule the former case, if they are to stand as the law of the state. Is there any reason why the former should remain the rule in preference to the latter? As has been said, the former case depends largely for its support on the recording act of the state. Of course, the statute, in the true spirit, should prevail; and, if that spirit is reflected in the *Pettingill* case, the holding therein announced should be sustained, even to the overruling of the other cases. As to any support the *Pettingill* case may have independent of the statute, we must look to other states, as the decisions of this court in all the other cases cited in this opinion are against it. It may be conceded that the

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courts of other states are not in harmony as to the effect of a quitclaim deed. Its effect generally has been discussed in this state, and the holding of the court is by no means doubtful.

In discussing generally the effect of a quitclaim deed, Mr. Chief Justice ADAMS used these words in *Winkler v. Miller, supra*: "Woodward, who derived title by quitclaim deed, could not be deemed a *bona-fide* purchaser without notice. * * * Where a person purchases of another, who is willing to give only a quitclaim deed, he may properly enough be regarded as bound to inquire and ascertain at his peril what outstanding equities exist, if any. His grantor virtually declares to him that he will not warrant the title, even as against himself; and it may be presumed that the purchase price was fixed accordingly."

In the case of *Woodward v. Jewell*, 25 Fed. Rep. 691, speaking of the effect of a quitclaim deed, the court says: "This question has been adjudicated by the courts of the several states so as to leave a distressing conflict of authorities; but the supreme court of the United States has settled the rule for our guidance here. They hold that a grantee in a quitclaim deed cannot defend as a *bona-fide* purchaser without notice."

A few brief extracts will indicate the views and holding of the supreme court of the United States as to the effect of a quitclaim deed: In *Oliver v. Piatt*, 3 How. 410, the court said: "Another significant circumstance is that this very agreement contained a stipulation that Oliver should give a quitclaim deed only for the tracts; and the subsequent deeds given by Oliver to him were accordingly drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title and interest in the property; and under such circumstances it is difficult to conceive how he can claim protection as a *bona-fide* purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an

unextinguished trust to the tracts." Also, in *May v. Le Claire*, 11 Wall. 217, it is said: "On the twenty-seventh of July, 1859, Dessaint conveyed, by a deed of quitclaim, to Ebenezer Cook. The evidence satisfies us that Cook had full notice of the frauds of Powers, and of the infirmities of Dessaint's title. Whether this were so or not, having acquired his title by a quitclaim deed, he cannot be regarded as a *bona-fide* purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey."

In *Gest v. Packwood*, 34 Fed. Rep. 372, it is said, speaking of a quitclaim deed: "Notice sufficient to prevent the purchaser from being *bona fide* is said to inhere in the very form of this kind of a conveyance. * * * In such a case the purchaser only takes whatever the grantor could lawfully convey,—what there is left in him." The holding is supported by a reference to *Oliver v. Piatt*. It would be fruitless to cite largely from state decisions on this question. The rulings of the majority of the state courts are in harmony with those of the federal courts on this question. In *Johnson v. Williams*, 37 Kan. 179; 14 Pac. Rep. 537, it is said: "In nearly all cases between individuals, where land is sold or conveyed, and where there is no doubt about the title, a general warranty deed is given; and it is only in cases where there is a doubt concerning the title that only a quitclaim deed is given or received. Hence, when a party takes a quitclaim deed he knows he is taking a doubtful title, and is put upon inquiry as to the title. The very form of the deed indicates to him that the grantor has doubts concerning the title; and the deed itself is notice to him that he is getting only a doubtful title."

Barring the case of *Pettingill v. Devin*, the authorities in this state are in accord with those of the federal courts; and, to our minds, the reasoning of the cases cited, independent of statutory considerations, is unanswerable. Let us look to the statute, to see if it is controlling in importance. Code, section 1970, gives a

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form for quitclaim deeds as follows: "The following, or other equivalent forms, varied to suit circumstances, are sufficient, for the purposes therein contemplated, for a quitclaim deed: 'For the consideration of — dollars, I hereby quitclaim to A. B. all my interest in the following,' etc." It is apparent that no more is contemplated by such a conveyance than to convey the interest of the grantor, whatever it may be. It should be noticed that in this form of deed the grantor does not covenant or say that he has the title, or any interest. In this respect it is in marked contrast with the ordinary deed of conveyance, which expresses exactly what the title owner can and should express, and what the purchaser desires. It in no sense purports to convey a title, not even by inference. If it was there by legal inference, then the grantor would be liable for its failure; and such is not the effect of a quitclaim deed. It is practically said in *Gest v. Packwood, supra*, that the deed is itself a notice of a want of or a defect in the title. These deeds are generally taken upon a venture. The idea is: "I may get something, or I may not." This court, in the cases cited, has many times said that the holder of the quitclaim deed takes it with notice of prior equities. Looking to Code, section 1941, its language makes it inapplicable to such a state of facts. Its language is that "no instrument affecting real estate is of any validity against subsequent purchasers * * * without notice," etc. If the presentation of such a deed is notice of a defect in or want of title, then the holder cannot take without notice, and stands unprotected by the statute. We think the case of *Pettingill v. Devin* must be regarded as overruled by subsequent decisions.

II. A question is made in the case as to the dower interest of Mrs. Lauber; it appearing that when she signed the bond to plaintiffs she had no information that it was intended as security, instead of an actual sale. We do not see how, under the state of this record, this fact would change the result. The actual consideration, forty-seven hundred dollars, was paid; and if the

2. DOWER: release of: misunderstanding.

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property is taken for that consideration, even by the process of foreclosure, how can she complain? She has merely parted with what she intended to, for the consideration intended. No prejudice has resulted to her from a variance as to facts, nor does she complain. Neither can the variance as to facts prejudice the defendant.

III. It is urged that the defendant was in fact a good-faith purchaser, or parted with its money in good faith, relying upon the record as to the condition of the title. Of this we have no doubt; but, with our holding as to the legal *status* of the holder of such a deed, the legal presumption must prevail as against the facts as claimed. We think the judgment of the district court right, and it is

AFFIRMED.

79	348
85	160

LEAVITT AND JOHNSON V. REYNOLDS.

Mortgages: NOTES DUE IN SUCCESSION: ORDER OF PAYMENT. A mortgage secured three notes due in successive years, with no provision for payment before maturity. The first two were indorsed to plaintiffs, and the third to defendant. The mortgage provided: "But should said party of the first part fail to pay said notes or the interest when due * * * as above provided, then the whole sum remaining unpaid shall become due, and this mortgage may be foreclosed." Upon failure to pay the first two notes when due, plaintiffs began an action of foreclosure, and defendant intervened, setting up that his note became due upon failure to pay the other two, and asking to share *pro rata* in the proceeds of the property. But *held* that the third note did not, by the provision of the mortgage, become due in such sense as to expunge from the contract the agreement implied by law, that the notes should have priority in the order of their maturity; which is the established doctrine in this state. (See opinion for citations.)

Appeal from Black Hawk District Court.—HON. C. F. COUCH, Judge.

FILED, FEBRUARY 5, 1890.

ON July 14, 1885, Nellie Goodwin and her husband executed and delivered to E. W. Burnham a mortgage for thirty-one hundred dollars, covering what is known as "Burnham's Opera House," in Waterloo, Iowa, and securing the payment of three promissory notes, as follows: One for one thousand dollars, due August 1, 1886; one for one thousand dollars, due August 1, 1887; and one for eleven hundred dollars, due August 1, 1888. Mr. Burnham soon thereafter sold the two notes first named to the plaintiffs, Leavitt and Johnson, with proper endorsements, and about the same time sold the third or eleven-hundred-dollar note to the intervenor, J. M. Reynolds, Jr. The first note was not paid when due, but one year's interest was paid on all of the notes. The second not being met when due, the plaintiffs in September, 1887, commenced this proceeding to foreclose said mortgage, and demanded that their lien be the first and prior lien on the mortgaged property, and that their notes be paid in full from the sale of the mortgaged premises. On October 10, 1887, the intervenor, who is the appellant herein, filed his petition of intervention, setting forth the fact that he is owner and holder of the third note, and that the same then was, by the terms and conditions of said mortgage, due and payable; it being provided in said mortgage: "But should said party of the first part fail to pay said notes or the interest when due, or fail to keep said property insured, as above provided, then the whole sum remaining unpaid shall become due, and this mortgage may be foreclosed." That by virtue of such provision said third note became due upon default made in the payment of the first notes, causing the whole debt to at once become due at the time of such default. The petition of the intervenor asks that he have judgment for the amount due upon his note, and that upon sale of the mortgaged premises the proceeds thereof be divided *pro rata* between the holders of the several notes, and that plaintiffs' claim to priority be denied, and that the intervenor's right in the mortgaged premises be decreed

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equal to that of the plaintiffs. To this petition of the intervenor plaintiff demurred. The court sustained the demurrer, and denied to intervenor the *pro-rata* distribution asked in the petition, and entered judgment against him for costs of intervention. From this ruling and judgment the intervenor appeals.

Mullan & Hoff, for appellant.

O. C. Miller, for appellees.

GIVEN, J.—I. Different rules are observed in different states in applying the security, when several obligations falling due at different times are secured by the same mortgage. The states of New York, New Jersey, Pennsylvania, Minnesota, Kentucky and other states have adopted what is termed the "*pro-rata* theory;" that is, the security is divided among the holders of the different obligations, according to the sums due thereon, neither having priority over the other. In this state, and in Ohio, Indiana, Illinois, Alabama and some other states, the *pro-tanto* or priority rule is followed, under which the notes first maturing are treated as prior, and to be first paid in full out of the security. *Isett v. Lucas*, 17 Iowa, 503, and cases therein cited. There is some discussion as to the respective merits of these rules. While much can be said for and against either, we deem it of more importance that the one adopted in the state shall be continuously followed than as to which should be adopted. The *pro-tanto* rule was adopted in this state as early as 9 Iowa, and has been followed ever since. See *Grapengether v. Fejervary*, 9 Iowa, 163. The question here presented is not as to which of these rules should be adopted in this state, but whether the provision in the mortgage that default in the payment of the principal or interest, when due, shall cause the whole sum remaining unpaid to become due, renders all the notes due at one time, in case of default, so that neither is entitled to priority. Where several notes, secured by the same mortgage, fall due at the same time, neither

would be entitled to priority. Appellant's contention is that, under the provision of the mortgage above quoted, the failure to pay the first and second notes when due rendered his note due at the same time, and therefore he is entitled to a *pro-rata* share of the security.

These notes were not made payable on or before, but on, the day named in each. Hence the maker could not have stopped the running of the interest by tendering payment before maturity, and the holder could not be compelled to receive payment before maturity, but had a right to stand upon his contract, and receive his interest up to the maturity of his note. Can it be said that, by defaulting the payment of the first note, the last was rendered due, so that the maker might have stopped the running of the interest by tendering payment? We think not. The evident purpose of such a provision in the mortgage is that, in case of default and foreclosure on the installment first falling due, the surplus of the security may be applied on the remaining obligations, instead of being held idle until maturity. The default in the first renders subsequent notes due or not, at the election of the holder. If he prefers, he may waive his right to the mortgage security, and stand upon the terms of the note, or he may elect to treat his note as due, and demand his share of the security. To apply the rule contended for by the appellant, in a state where the *pro-tanto* rule is the established law, would add an element of uncertainty to mortgage securities that would seriously affect their value. Such a rule would render it uncertain whether, under mortgages like this, the security would be applied *pro rata* or *pro tanto*. Take a case of three notes and mortgage, like those under notice, as illustration. A party knowing that, under the laws of the state, the notes are entitled to priority according to the order of their maturity, and knowing the security to be sufficient for the first two notes, but insufficient for the whole, purchases and pays for the two notes first falling due on that basis. If the maker may, by defaulting, deprive these notes of their

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priority, then surely they would not be purchased so readily, nor at such a price.

The rule contended for would render it possible for the mortgagor and holder of the notes last falling due to defeat the holder of the first notes of his priority, by the maker's failing to pay the interest on the last note, whereby all become due, and the holder of the last be entitled to a *pro-rata* share of the security. Notes of this description, secured by mortgages and deeds of trust, enter largely into the business transactions of the state, and the courts should hesitate before pronouncing a rule that would render it uncertain whether security for such notes would be applied *pro rata* or *pro tanto*. Our conclusion is that the maturity of the notes, by reason of default in making prior payment, is not such a falling due as should change the rule for the application of the security. We are aware that in *Bank v. Covert*, 13 Ohio, 240, and in *Pierce v. Shaw*, 51 Wis. 316, the contrary doctrine was held. We have examined these cases with care, and, with the profoundest respect for those courts, must say that we cannot concur in the conclusions. One of the grounds upon which the *pro-tanto* rule is supported is that making the notes mature at different times evidences an agreement that they are to have priority in the order in which they fall due. Hence cases of default, like this, are not such a falling due as expunges from the contract the agreement as to priority. We think there was no error in sustaining plaintiff's demurrer to intervenor's petition, and therefore the judgment of the district court is.

AFFIRMED.

HALL *et al.* v. HORTON.

1. **Evidence: EQUITABLE ISSUE IN LAW ACTION: APPEAL.** Where in a law action an equitable issue arises, and it is tried by the court without a jury, and the evidence on such trial is equally balanced, the party who has the burden of proof must fail, and he cannot in this court ask that on that issue evidence introduced in trial of the other issues before the jury be considered.

Hall v. Horton.

2. **Contract: CONDITION PRECEDENT: WHAT IS NOT.** In a contract for a lease the following language occurred: "The one hundred dollars to be paid on signing of said lease is to apply on first month's rent." There was no other reference to the one hundred dollars in the contract. *Held* that the payment of the one hundred dollars was not a condition precedent to the making of the lease; and that, as the contract was not ambiguous on that point, the fact that the proposed lessee paid the one hundred dollars before the lease was made did not show that it was the understanding of the parties that such payment was a condition precedent. (*Corbett v. Berryhill*, 29 Iowa, 158, and *McDaniels v. Whitney*, 38 Iowa, 60, distinguished.)
3. ———: TO MAKE LEASE: BREACH: DAMAGES. Where a contract for a lease provided for the payment by plaintiffs (lessees) of one hundred dollars upon the execution of the lease, and they paid fifty dollars, but, through no fault of theirs the lease was never executed, they were entitled to recover at least the fifty dollars paid by them.
4. **Instruction: ERROR WITHOUT PREJUDICE.** An instruction which submits a question not in issue is erroneous, but where, in view of the evidence, the error is against plaintiff only, defendant cannot complain.
5. **Contract: TO MAKE LEASE: BREACH: MEASURE OF DAMAGES.** While the measure of damages for a breach of contract to make a lease and put a tenant in possession, where no rent has been paid, is the remainder of the market rental, after deducting the agreed rental (*Alexander v. Bishop*, 59 Iowa, 572), yet other damages which are the direct and natural consequence of the breach of contract can be recovered. (*Adair v. Bogle*, 20 Iowa, 244.) And in this case, *held* that, for breach of contract to lease a hotel, plaintiffs were entitled to recover for their loss of time in waiting for the hotel, and for their expenses in coming from a distant state to the place where the hotel was, and for money paid under contract to a clerk whom they had employed and brought with them to aid in operating the hotel.
6. ———: ———: ———: EVIDENCE. Where, in an action for breach of contract to make a lease, the value of the lease was put in issue by the first count of the petition and the general denial of the answer, but plaintiffs offered no evidence to sustain that count, and evidence offered by defendant as to the value of the lease was not offered in rebuttal, and did not tend to sustain any affirmative defense pleaded, it was properly rejected.
7. ———: ———: ———: EVIDENCE OF PAYMENT. In such case, evidence which tended to show that plaintiff had made a payment on the lease by paying money to third parties on account of and for the benefit of defendant, and that it was made and received on the conditions authorized, was competent.

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Appeal from Polk District Court.—HON. JOSIAH GIVEN and HON. MARCUS KAVANAGH, JR., Judges.

FILED, FEBRUARY 5, 1890.

ACTION to recover for money paid, and for damages alleged to have been sustained by reason of a breach of contract to lease certain property. The answer sets up various defenses, alleges a mistake in the contract upon which the action is brought, and demands that it be reformed. The equitable issue was tried by the court, GIVEN, J., presiding, and a decree rendered in favor of the plaintiffs. The remaining issues were tried to a jury, KAVANAGH, J., presiding, and a verdict and judgment rendered for plaintiffs. The defendant appeals from the decree and from the judgment.

Read & Read, for appellant.

Phillips & Day, for appellees.

ROBINSON, J. On the sixteenth day of May, 1887, the defendant entered into an agreement in writing with plaintiffs, J. C. Hall and H. H. Norton, whereby he agreed to rent to them the Capitol Hotel, in Des Moines, together with appurtenances and furniture, and a billiard-room, for the term of six years from the first day of June, 1887. The agreed rental was two thousand dollars a year for the first four years, and twenty-five hundred dollars a year for the last two years, payable monthly in advance, excepting the sum of five hundred dollars, which was to be paid by plaintiffs when they took possession of the leased property, and which was to apply on rent for the last three months. The agreement also contained the following provision: "The one hundred dollars to be paid on signing of said lease is to apply on first month's rent." The agreement was somewhat informal, and was designed to be succeeded by a formal lease. No lease

Hall v. Horton.

was ever executed, and the possession of the property in question was never delivered to plaintiffs. A few days before the date fixed for the commencement of the lease, the plaintiffs went to Des Moines, prepared to carry out the agreement on their part, and took with them a young man who had been engaged to act as clerk of the hotel. When the agreement was made, and when plaintiffs went to Des Moines to commence business, the hotel was occupied by a tenant of the defendant. He refused to surrender possession. Litigation to evict him followed, and he did not finally leave the property until September 20, 1887. When the agreement in suit was made, the plaintiffs were non-residents of the state; Hall being a resident of Indianapolis, and Norton of Chicago. Plaintiffs seek to recover for damages alleged to have been sustained by them through the fault of defendant, including loss of time and expenses. They commenced this action on the twenty-fourth day of August, 1887.

I. Appellant contends that a provision was agreed upon between the parties to the agreement which should have been included in the memorandum signed, but which was omitted therefrom by mistake. It is set out in the answer in words as follows: "The defendant agrees to use all reasonable effort to oust the present occupant from said hotel, so as to deliver possession thereof by the first of June, 1887, or as soon thereafter as possession can be obtained from Eyster." To sustain his claim in regard to the alleged mistake, the defendant introduced the testimony of the agent who negotiated and signed the agreement on his part. That is fully contradicted by the testimony of Norton, who acted for the plaintiffs. The burden of that issue being upon defendant, he must fail. It is said that his witness is corroborated by evidence that was submitted on the trial of other issues to the jury, but in deciding the issue under consideration we can only regard that evidence which was offered to support or refute it.

1. EVIDENCE:
equitable is-
sue in law ac-
tion: appeal.

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II. Appellant contends that the provision of the agreement in regard to the payment of one hundred dollars was a condition precedent, and that until it was complied with on the part of plaintiffs no liability was created, or could exist, on the part of defendant. We do not think the construction contended for is the correct one. The agreement contains no reference to the payment of the one hundred dollars, excepting what we have quoted, which is: "The one hundred dollars to be paid on signing of said lease is to apply on first month's rent." There is nothing in this language to justify the claim that the lease was not to be signed until after the money was paid. On the contrary, it is apparent that it was to be at the time of the signing. Defendant could not legally demand the payment until he tendered a lease, duly made on his part, in accordance with the terms of the agreement in suit.

III. Appellant contends that, notwithstanding the language of the agreement, it should be construed as the parties by their conduct and actions interpreted it. It appears that after the agreement was signed the plaintiffs forwarded to defendant, at Rochester, Minnesota, the sum of fifty dollars, and paid on his account, to a firm in Chicago, the further sum of fifty dollars, as a compliance with the provision in question. Some question is made as to the right of plaintiffs to make the last-named payment. It is contended by appellant that it was not made by authority, but that, by making it, and by sending fifty dollars to him in Minnesota, the plaintiffs showed that they understood the money was to be paid before the lease was signed. The cases of *Corbett v. Berryhill*, 29 Iowa, 158, and *McDaniels v. Whitney*, 38 Iowa, 60, are relied upon as supporting that claim. But neither of those cases is authority for the proposition that the acts of the parties to an agreement will justify an interpretation which would be contrary to the intent of the parties, as clearly expressed in the language they have used. Where that language is so

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ambiguous as to leave their intent in doubt, and different interpretations are permissible, recourse may be had to the circumstances surrounding the parties when their agreement was made, and to the construction they have placed upon it, as shown by their acts. But this is not a case of that kind. The language used is such that the doubt suggested by appellant cannot arise.

IV. The court charged the jury that it appeared from the evidence, without conflict, that plaintiffs were entitled to recover damages in the sum of

8. — : to make
lease: breach:
damages.

fifty dollars at least, with interest. Appellant insists that there was conflict in the evidence, and that the question of plaintiffs' right of recovery should have been submitted to the jury. It is shown, without conflict in the evidence, that the agreement in suit was duly entered into by all the parties to it; that plaintiffs paid to defendant fifty dollars before they went to Des Moines, to apply on the lease; that plaintiff Norton went to Des Moines in the latter part of May, 1887, and that plaintiff Hall went there a few days later, and that both went there prepared to join in the execution of a lease, and to perform on their part all the requirements of the agreement in suit; that defendant tendered to them, for signatures, a lease which did not comply with the terms of the agreement, and which was refused by them; that plaintiffs then tendered to defendant a form for a lease which he refused to read, saying, in effect, that any necessary changes could be made on the lease he had drawn; that he made no further tender of a lease to plaintiffs until after this action was commenced; that the property in controversy was in the possession of a tenant named Eyster when plaintiff went to Des Moines, and that he remained in possession until the twentieth day of the next September; that defendant refused to pay the sum he demanded to vacate. In view of these undisputed facts, the court did not err in charging the jury as stated.

V. The evidence shows that the firm of Hook & Ward, of Chicago, made a charge against defendant for

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4. INSTRUCTION:
error without
prejudice.

services alleged to have been rendered in effecting a lease of the property in question to plaintiffs. After the agreement in suit was entered into, defendant authorized plaintiffs to pay Hook & Ward fifty dollars, if they would accept that sum in full of their demand against him. Plaintiffs paid the fifty dollars, as authorized, but the receipt which they first took did not express that the money was received in full payment of all claim for the services in question. Defendant refused to ratify the payment, on the ground that it was not made as required; and plaintiffs then obtained from Hook & Ward a receipt in full for their claim in consideration of the payment already made to them. The court charged the jury as follows: "If you should find from the testimony that the defendant in this case authorized the plaintiffs to pay fifty dollars to Hook & Ward upon account, then plaintiffs will be entitled, in like manner, to recover the fifty dollars so paid. But, if you should find that plaintiffs were authorized to pay said fifty dollars as settlement in full of the claim of Hook & Ward, then the plaintiffs will not be entitled to recover the fifty dollars so paid." Appellant complains of this instruction on the ground that the undisputed evidence shows that plaintiffs were not authorized to make the payment upon account. We think the charge was erroneous in the respect claimed, at least; but the evidence shows without conflict that the money was received by Hook & Ward in full settlement of their claim, and the money was therefore paid on account, as directed. The instruction was of a nature to prejudice appellees, but not appellant..

VI. The court charged the jury that plaintiffs were entitled to recover the contract price for the services of the clerk they employed and retained, with the knowledge of defendant, on account of the expected lease, and for the reasonable value of their own services while waiting for the hotel to open, prior to the commencement of this action, and for their reasonable personal

5. CONTRACT: to
make lease:
breach: meas-
ure of dam-
ages.

Hall v. Horton.

expenses in going to Des Moines to take charge of the hotel ; also, that plaintiffs were entitled to recover for the service of plaintiff Norton up to such time as defendant tendered to him the hotel, if possession was tendered, and, if not, then the reasonable value of his time, less such sums as he had earned up to the time of trial, if he had made reasonably diligent and continuous effort to find suitable employment. This portion of the charge is objected to by appellant on the ground that the measure of damages for a breach of contract to make a lease and put a tenant in possession, where no rent has been paid, is the remainder of the market rental value after deducting the agreed rental ; and the case of *Alexander v. Bishop*, 59 Iowa, 572, is cited in support of the objection. It is true the general rule is as claimed ; but it was held in *Adair v. Bogle*, 20 Iowa, 244, that other damages, which were the direct and natural consequences of the breach of contract complained of, could be recovered. In this case the evidence shows that plaintiffs incurred much loss of time and expense to carry out their agreement, and that defendant must have known that it would be, and was being, incurred while he failed to comply with his part of the agreement. It is said that the agreement in suit was entered into by plaintiffs as copartners, and that they are not entitled to recover for loss of time and expenses incurred by them as individuals. But the expenses incurred, and the time spent, were for the benefit of the copartnership, and plaintiffs are entitled to recover for them. They do not bring the action as a firm, but as individuals composing the copartnership. Defendant is not interested in the division which they may make of the amount of their recovery.

VII. Appellant complains of the refusal of the court to permit him to show that the property in question was
6. —:—: not favorably located to do a profitable
—:evidence. business ; that its patronage from the time it was constructed has been meager ; that persons who have conducted it have lost money in so doing ; that the patronage of the hotel would not pay a rental of two

The State v. Waterman.

thousand dollars per year, and running expenses ; that the rental value of the hotel would not exceed one hundred dollars per month ; and that plaintiff could not have earned anything in addition to running expenses. Most of the evidence thus refused was of a purely speculative character, and for that reason was properly excluded. The value of the lease was put in issue by the first count of the petition and the general denial of the answer. But plaintiffs offered no evidence to sustain that count, and the evidence in question was not offered in rebuttal, and did not tend to sustain any affirmative defense pleaded. Therefore it was properly rejected.

VIII. Appellant insists that the court erred in permitting proof of the payment made by plaintiff to Hook & Ward, including the admitting in evidence of the second receipt, showing payment in full of the receiptor's claim against defendant. The evidence objected to was competent to show that money had been paid on account of and for the benefit of defendant, and the receipt showed that it was made and received on the conditions authorized. Therefore it was properly admitted.

IX. Other questions are discussed by counsel. Some of them are disposed of by what we have already said. Others refer to matters of minor importance, and none need be specifically referred to ; but it is sufficient to say that we have examined all questions thus presented with care, and discover no error prejudicial to defendant. The judgment of the court is

AFFIRMED.

THE STATE V. WATERMAN.

1. **Highways: ESTABLISHMENT: NOTICE: JURISDICTION: PRESUMPTION.** Under section 519 of the Code of 1851, providing that "previous to the presentation of a petition for the establishment of a county road four weeks' notice thereof must be given by being posted up" at certain named places, an affidavit of the petitioner,

79	360
81	375
79	360
87	407
79	360
88	695

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attached to a copy of the notice on file with the papers, stating that he posted the notices at the required places, but failing to state the time of posting, was not sufficient to give the county court jurisdiction to establish the road. And since the record of the court in the case contained this recital: "Affidavit of J. T. (the petitioner), signed and sworn to, of posting up notices according to law, and filed with the papers," *held* that no presumption could be entertained, from the fact that the court assumed jurisdiction, that it had before it other evidence that the notices were posted in due time: for when a court undertakes to state the evidence on which its jurisdiction rests it will be presumed that it states it all. (See opinion for citations.)

2. ——— : ——— : NOTICE : SUFFICIENCY : SERVICE : EVIDENCE. In such case, where the validity of the establishment of the alleged highway was in question, the testimony of the petitioner that he posted the notices in the time required by law was immaterial, since the notice itself was fatally defective in not stating the time when the petition would be presented.
3. ——— : DEDICATION BY MISTAKE : ESTOPPEL. Where the owner dedicates land for a highway under a mistaken belief that it is a legal highway, and it is accepted as such, and expense is incurred by others upon the faith of the dedication, it is binding on the land-owner. (See *Marratt v. Deihl*, 37 Iowa, 250.)
4. ——— : VOID PROCEEDINGS TO ESTABLISH : TITLE BY PRESCRIPTION. While title by prescription cannot be acquired by the public to land used as a highway under a mistake of fact on the part of the public and the land-owner as to the true location of the highway (see opinion for citations), yet where it is so used in mutual reliance upon proceedings establishing the highway, which are afterwards found to be void, such mistake is one of law, and such use is based on color of title, and after ten years it ripens into title by prescription. (See *Railway Co. v. Allfree*, 64 Iowa, 508, and *Colvin v. McCune*, 89 Iowa, 504.)

Appeal from Clayton District Court.—HON. L. O. HATCH, Judge.

FILED, FEBRUARY 5, 1890.

DEFENDANT was indicted and tried for the crime of nuisance, alleged to have been committed by obstructing a public highway, and was acquitted. The state appeals.

John Y. Stone, Attorney General, *J. Larkin* and *R. Quigley*, for the State.

James O. Crosby, for appellee.

ROBINSON, J.—The course of the alleged highway in question is irregular, but its general direction is from north to south. It extends lengthwise through an eighty-acre tract of land which is owned by defendant. It is shown, and not denied, that he obstructed it by the building of a fence, but it is claimed that it was not a legally established public highway. The evidence tends to show the facts of the case to be as follows: An attempt to establish the alleged highway in the manner provided by law, was made in the year 1860. A petition was presented to the county court of Clayton county for that purpose, together with proof of service of a notice that a petition would be presented. A commissioner named Brown was appointed to examine the route prepared for the highway and to act and report thereon. A report in favor of the establishment of the highway was made, and a day for the final hearing was fixed by the court. On the day so fixed, to-wit, May 7, 1860, the court ordered that the road be established, according to the survey and report of the commissioner, as a public highway. From that time until the year 1886 the road in question was traveled by the public substantially on the line alleged to have been surveyed by the commissioner, and was treated by the inhabitants of the vicinity and the road supervisors as a public highway. In 1866 defendant purchased the eighty-acre tract of land already referred to, and did so knowing that the road in question was claimed to be a public highway. About the year 1869 defendant employed a surveyor named Zearley to locate the road according to the commissioner's report of the survey, and at another time prior to 1874 employed a second surveyor for the same purpose. Both of those surveyors located the road substantially on the line now in question. After the surveys were made, defendant treated the road as a public highway, fenced it from his fields on each side, and spoke of it as a highway. In 1884 a highway, commencing in the road in question, was established in part

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over land of defendant, and he was allowed one hundred dollars as damages on that account. The value of that highway to those who wished to travel it depended in large part upon the road in question being a public highway. A short time before it was obstructed by defendant other surveys were made, which, it is claimed, show that the highway which the court attempted to establish was not on the line of that in question. It is also claimed that the proceedings for the establishment of the highway were fatally defective. We are not asked to pass upon the sufficiency of the evidence to sustain the verdict, but to decide certain legal questions which are involved in the appeal.

I. The road in question is known as "number 297." The fifth paragraph of the charge is as follows:

1. HIGHWAYS:
 establish-
 ment: notice:
 jurisdiction:
 presumption.
 "(5) The first question for your consideration is this: Is the road in question a public highway? The record and papers introduced by the state to prove that road known as 'number 297' was established by the county court of Clayton county shows that the proper steps were not taken to give the county court jurisdiction of the matter, and the order of the court, establishing the road, is therefore void, and road number 297 is not a public highway. The record evidence, therefore, in regard to this road, can have no value, except to show the attempt to establish a road; and to explain the action of defendant and others in relation to the same."

The record of the county court in regard to the road, from the presentation of the petition therefor up to and including the appointment of the commissioners, is as follows: "February term, 1860. At a regular session of the county court, held at Garnavillo, said county, February 6, 1860, the petition of Jacob Thein and others was presented, asking the appointment of a commissioner to view and locate a road commencing at the guide-board near B. L. Mead's, running south through sections 24 and 25; thence down the Turkey river bank, terminating near John Garber's mill. Affidavit of John Thein, signed and sworn to, of posting up

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notices according to law, and filed with the papers. Bond executed by Jacob Thein, as the law directs. A. Brown was appointed commissioner to view the proposed road, commencing February 20, 1860, and report upon the same. Commission issued February 6, 1860."

A petition and notice filed on the date of the foregoing record were introduced in evidence. The notice stated that a petition would be presented at the "February term of the county court of Clayton county, Iowa," but did not specify the place where, nor the year in which, the presentation would be made. An affidavit by Jacob Thein, and sworn to by him before the county judge, was attached to the notice. It recited that the affiant posted "one notice on the court-house door, and three notices in three public places in Volga township, of which the annexed notice is a true copy," but failed to state when the posting was done. The proceedings to establish the road in question were had under the provision of the Code of 1851. Section 519 of that Code required the notice to be posted four weeks previous to the presentation of the petition. The record proof of posting was not sufficient. It is contended by counsel for the state, however, that it should be presumed that there was other proof than the affidavit of Thein, competent and sufficient, which showed legal service of the notice. The cases of *McCollister v. Shwey*, 24 Iowa, 363; *Woolsey v. Supervisors*, 32 Iowa, 130, and *Carr v. Fayette County*, 37 Iowa, 608, are cited as supporting that claim. Those cases held that where the record recites that due service of the notice was made, or where the record is silent as to that, and nothing to the contrary appears, it will be presumed that proof other than that disclosed by the record, when that is not sufficient, was offered, and acted upon by the court. But the only fair construction to be placed upon the record in this case is that the court received no proof of service other than the affidavit of Thein. That alone is referred to as proof of service. The court attempted to identify the proof upon which

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it acted, and there is no ground for presuming that it failed, nor that proof was submitted which is not shown by the record. It is true that section 523 of the Code of 1851 required the court to be satisfied that due notice had been given before appointing a commissioner, but it has been held that the fact that an inferior tribunal has acted in a proceeding before it, as though it had jurisdiction of the parties, raises no presumption that it had acquired such jurisdiction, in the absence of a recital in the record to that effect. *McBurney v. Graves*, 66 Iowa, 316. Even an adjudication by a tribunal that it has jurisdiction of the parties will not prevail against the record in the case which shows that it has not. *Miller v. Corbin*, 46 Iowa, 151; *Bardsley v. Hines*, 33 Iowa, 157.

It is said that "the presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts, concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence, or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred." *Galpin v. Page*, 18 Wall. 350. The rule would apply with at least as much force to courts of inferior jurisdiction. *Morrow v. Weed*, 4 Iowa, 87.

II. The state offered to show by Thein that the notice was in fact duly posted as required by law. The

notice referred to was that to which the proof of service already considered was attached. Section 520 of the Code of 1851 required the notice to state the time at which the application would be made to the county court. The one in question was fatally defective, in

2. —: —:
notice: suffi-
ciency:
service: evi-
dence.

that it failed to specify the time when the application would be made with sufficient definiteness. It was not dated, and the only reference to time is contained in the words, "a petition will be presented at the February term of the county court of Clayton county." The year of the term referred to could only be conjectured. Since the notice was not sufficient, evidence to show that it was duly posted was immaterial, and the question presented as to the competency of the proposed evidence need not be determined.

III. The court charged the jury as follows: "If you find from the evidence that the defendant caused the Zearley survey to be made, and fenced out a road along the same, not intending thereby to give or set apart a highway for the public, but only intending thereby to leave for the public the highway which the defendant believed the public had already acquired by the action of the county court, you will find there was no intention to dedicate, and therefore no dedication." There was some evidence tending to show that dwellings had been located and constructed, and a highway established, upon the belief that the road in question was a public highway, and that defendant had contributed to that belief. The case is, therefore, brought within the rule announced in *Marratt v. Deihl*, 37 Iowa, 250, where it was held that a dedication made and accepted, under a mistaken belief that the road was a legal highway, was binding, where expense had been incurred upon the faith of the dedication. The portion of the charge quoted was therefore erroneous.

IV. The thirteenth paragraph of the charge is as follows: "If you find that the road in question was continuously used and claimed by the public as a public highway, for ten years or more, with the knowledge of such claim and use on the part of defendant, and without objection from him; and if you further find that defendant had express notice of such claim on the part

3. —: dedica-
tion by mis-
take: estop-
pel.

4. —: void pro-
ceedings to
establish title
by prescrip-
tion.

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of the public, independent of, and distinct from, the use of the road by the public, you will find that such road became a public highway by prescription, unless the defendant's failure to object to such use and claim was the result of a mistake on his part. If he did not object, because he believed the road in question was a public highway, duly established by the county court, such road did not become a public highway by prescription." Counsel for the state contend that the belief of defendant in regard to the effect of the action taken by the county court to establish the road as a public highway was immaterial, and therefore that the last part of the paragraph quoted was erroneous. In the cases of *State v. Crow*, 30 Iowa, 258; *State v. Welpton*, 34 Iowa, 144; *State v. Gould*, 40 Iowa, 372; and *State v. Schilb*, 47 Iowa, 611, it was held, in effect, that title by prescription could not be acquired to land used as a public highway under a mistake of fact on the part of the public and the land-owner as to the true location of the highway; but in this case the mistake contemplated by the charge was one of law, in regard to the legal effect of the action taken by the county court. It was said, in *State v. Welpton*, *supra*, in effect, that ten years' use of a way by the public, under a claim of right, would, under our statute of limitation, bar the right of the land-owner to it. It was further said that the public has the same protection as one holding the possession of lands adversely, under claim of right. The claim of right sufficient to sustain the bar of the statute may be a mere color of title, based upon void proceedings. *Chicago, R. I. & P. Ry. Co. v. Allfree*, 64 Iowa, 503; *Colvin v. McCune*, 39 Iowa, 504. The belief of defendant as to the right of the public to use the road in question would not affect its right to acquire title by prescription. We conclude that the thirteenth paragraph of the charge is erroneous.

V. Other questions are discussed by counsel, but, since the defendant was acquitted in the court below, it is not necessary to determine them. The judgment of the district court is

REVERSED

79	368
81	657
79	368
88	105
79	368
90	510
90	572

THE STATE V. BECKEY.

Grand Jury: MODE OF DRAWING: SUBSTANTIAL DEPARTURE FROM LAW: INDICTMENT QUASHED. The provisions of the law in relation to the mode of obtaining grand jurors is directory. (See *State v. Gillick*, 7 Iowa, 287; *State v. Carney*, 20 Iowa, 82.) The law as now existing (See McClain's Ann. Code, sec. 819) requires that after the ballots bearing the names from which the grand jurors are to be drawn have been placed in a box and mixed, the clerk shall draw the number of jurors required, but that not more than one shall be drawn from each township, unless more jurors are required than there are townships in the county. In this case, where there were fifteen townships in the county and only twelve grand jurors were required, the ballots bearing the names of persons liable to be drawn from each township were sealed in separate envelopes, which were then placed in the box, and the clerk drew therefrom twelve of them. The ballots from each of the envelopes so drawn were then placed in the box, and the clerk drew one therefrom, thus obtaining twelve grand jurors. *Held* that the method was a substantial deviation from the method prescribed by statute, and that an indictment found by a grand jury composed of seven of the jurors so drawn was properly quashed. (See opinion for citation of related cases.)

Appeal from Muscatine District Court.—HON. ANDREW HOWAT, Judge.

FILED, FEBRUARY 6, 1890.

FROM a judgment of the district court sustaining a motion to quash an indictment for a saloon nuisance, the plaintiff appeals.

A. J. Lauder and *John Y. Stone*, Attorney General, for appellant.

No appearance for appellee.

GRANGER, J.—I. At the drawing of the grand jury that found and returned the indictment in this case, there were placed in the box provided for that purpose ninety-six, instead of seventy-five, names, as

provided by the letter of the statute, and that fact is made a ground of the motion to quash; and, as the judgment of the district court must be affirmed on another ground of the motion, and, as the court might not be agreed on this question, we deem it inadvisable to consider it at the present time, and dismiss the point, with the suggestion that a substantial compliance with the provisions of the law is required in such matters, and the uncertainty as to what may be regarded as a substantial deviation makes it safest and best, in practice, to adhere as far as may be to the literal provision of the statute.

II. The county of Muscatine has fifteen townships, and under the present law a grand jury for that county consists of seven members. The Code, after providing for seventy-five names as a number from which the grand jurors are to be drawn, provides (section 240) that, "at least twenty days prior to the first day of any term at which a jury is to be selected, the auditor or his deputy must write out the names on the lists aforesaid, * * * on separate ballots, and the clerk of the district court, or his deputy, and sheriff [or his deputy], having compared said ballots with the lists, and corrected the same, if necessary, shall place the ballots in a box provided for that purpose." The next section provides that the ballots shall be thoroughly mixed, and that the clerk shall draw the requisite number of jurors, which must be twelve in the county of Muscatine, from which number, at each term, seven are to be selected to constitute a panel. It is also provided that, in drawing the twelve jurors to be summoned, not more than one shall be drawn from the same township where the number of townships in the county is equal to or greater than the number of jurors to be drawn, and where more than one are drawn from the same township the officers drawing must reject the superfluous names. The names from which the jurors are to be drawn are furnished to the county auditor by the judges of the election in each election precinct, after notice from him of the number

The State v. Beckey.

required therefrom. It will thus be seen that the law provides that the names from which jurors are to be drawn are to be furnished to the auditor by the judges of election. From the lists of names thus furnished, the auditor is to write the names on separate ballots, and the clerk and sheriff are to compare the ballots with the lists returned to the auditor, and correct errors. The ballots are then to be placed in a box, thoroughly mixed, and the names of the jurors drawn therefrom. The officers, in drawing the grand jurors from which the panel was made that returned the indictment, adopted the following plan: The ballots containing the names returned from each township were separated, and sealed in separate envelopes. These envelopes, fifteen in number, were placed in a box, and the clerk drew therefrom twelve envelopes, which, of course, contained the names returned from twelve townships; and the number of townships thus drawn corresponded with the number of jurors to be drawn. The ballots in each envelope were then taken out, placed in a box, and one ballot drawn therefrom, and the person named thereon was the juror from that township; and in that manner, a juror was drawn from each of the twelve townships represented by the envelopes first drawn. This departure from the method prescribed by the Code for drawing the grand jury is made a ground in the motion for quashing the indictment.

It has been held in this state that the provisions of the law in relation to the mode of obtaining jurors are directory. *State v. Carney*, 20 Iowa, 82; *State v. Gillick*, 7 Iowa, 287. It is provided by statute that, if the appeal is taken by the defendant from a judgment against him, the supreme court must examine the record, and, without regard to technical errors or defects which do not affect the substantial rights of the parties, render such judgment on the record as the law demands. Code, sec. 4538. Of course, the validity of the indictment must be determined as if the question was presented on the defendant's appeal. In view of such statute, and guided by the rule that the statute providing

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a method of obtaining a jury is directory, this court has held that an indictment returned by a grand jury drawn from a box containing but seventy-three, instead of seventy-five, names is valid. *State v. Carney, supra*. It has also sustained an indictment where the clerk, in preparing for the drawing of the grand jury, placed the ballots, unfolded, in an open hat, instead of in a box, as provided by law, and drew the ballots therefrom. *State v. Gillick, supra*. In *State v. Knight*, 19 Iowa, 94, the judges of election returned eighty-five, instead of seventy-five, names, and the excess was stricken off, and the grand jury drawn from the remaining seventy-five. The indictment was sustained. In *State v. Brandt*, 41 Iowa, 593, there was a failure to return names as grand jurors from one township, and the board of county canvassers neglected to supply the names, as it was their duty to do, and two members of the board of supervisors, then in session for a specific purpose, supplied the names from such township; and from seventy-five names thus furnished the jury was drawn. Neither of the names furnished by the members of the board of supervisors was drawn on the jury. To the query, should the grand jury, as a body, because of such irregularity, be held illegal, this court gave a negative answer.

These cases are cited as precedents under which the court should sustain the indictment in this case; and the argument is, as to those cases, that the statute is directory, and the deviation is not such as to affect the substantial rights of the parties. To what extent officers of the law may depart from the course prescribed without affecting the substantial rights of parties is a question very difficult of judicial determination, and one as to which, as we are informed, no law-writer has attempted a solution. It is true that in many cases such fact is apparent, or may be affirmatively established by proofs. In many cases, however, the courts are left to assume the fact merely because of chances or opportunities from which it might arise. As indicating when the court will assume prejudice, we may look at the

case of *Dutell v. State*, 4 G. Greene, 125. In the preparation for drawing the grand jury, the law then required that the ballots and the lists of names returned should be compared and corrected by the county judge and sheriff. In comparing and correcting, in that case, the deputy sheriff acted instead of the sheriff. It was held that the deputy had no right, under the statute, to act in such a case for the sheriff, and that the departure was fatal to the indictment. In the case of *State v. Brandt, supra*, upon the same state of facts, the indictment was held bad, though by a divided court; and it is said in the opinion that the defendant "is prejudiced in his substantial rights." In *State v. Bowman*, 73 Iowa, 110, the indictment was quashed because of an irregularity in impaneling the grand jury under the present law. The judge at the prior term advised the jurors that they need not attend at the next term. At the term, however, a grand jury was impaneled, but without notice to the regular jurors, and it appeared that at least two of the regular jurors were absent because of the direction of the judge. The indictment was held bad because found by a grand jury illegally constituted. This must have been a holding that the substantial rights of the defendant were affected, because the statute, as to such rights, applies to the entire proceeding in a criminal case.

Looking to the case at bar, it is proper to inquire how great a change was effected by the mode adopted by the clerk. If the course prescribed in the law is pursued, in the box from which the drawing is had there will be names from each township in the county, aggregating seventy-five. The twelve jurors, when drawn, will represent one from each of twelve townships. The *personnel* of the twelve jurors, in this case, is made to depend on the chances of a mixture of the seventy-five names returned from all the townships, except as the number is diminished by the drawings made. A ballot with the name of A. has at least twelve chances of being drawn with every other name. The method adopted by-

The State v. Beckey.

the clerk introduced one drawing not provided for by law,—that of first selecting the townships to be represented on the grand jury. That feature of the drawing would certainly have been just as legal if he had used fifteen ballots with the names of the townships thereon, as to put the names in an envelope, sealed, and the name of the township on the envelope; so that that drawing was an entirely new device, and entirely without authority of law. The effect of this illegal proceeding was to eliminate from the drawing anticipated by the statute the names returned from three of the townships of the county. After this, by separate drawings, a name is selected from each township of the twelve selected. It cannot, of course, be said positively that the same twelve would not have been selected by pursuing the legal method, but the probabilities are largely against it. But we need not inquire as to that. No more could we say the same twelve would not have been selected if the clerk had omitted any drawing, and recorded a name from each of twelve of the list returned from the townships. If we are to sustain this indictment, it is difficult to see why we should not sustain them in cases of a wider departure from the provisions of the law, even to the extent of the methods suggested, of taking the names directly from the lists. If, to the validity of an indictment, a drawing by ballot of the grand jurors is absolutely necessary, the drawing should certainly be in substantial conformity to the provisions of the law. The one is not a necessity without the other. The proceedings in this case seem to us to be a substantial departure from its provisions. If we should refer to the liability of abuse in such a proceeding, and the danger of thwarting the purposes of the law, in having the result one of chance in the selection of a grand jury, it would be easy to show how a designing officer might secure his preference as between the townships. In the county of Muscatine one township (Muscatine) had thirty-four names on the list. Other townships had no more than two. With

Erickson v. Smith.

the ordinary envelope for drawing, how easily an officer could select or reject the envelope with thirty-four ballots, and thus secure a preference he might have. The statutory course does not admit of such an advantage.

In this connection, it should be said that both the judge, in an opinion, and counsel for appellant, in argument, state in substance that no claim is made that any of the officers acted with any design to do otherwise than select a fair and impartial jury from the names on the list, and that there is not the slightest evidence tending to show they had any motive but to discharge the duties devolved on them by the law. It appears to have been an attempt to reach the same result by what was thought to be a better method. In this, we think, there was such a departure as to invalidate the indictment.

The record presents some other objections to the indictment, which we think not fatal, and unnecessary to discuss. The judgment of the district court is

AFFIRMED.

ERICKSON v. SMITH *et al.*

Vendor's Lien: LOST BY MINGLING WITH OTHER DEBTS. Plaintiff and defendant exchanged lands in such a way that defendant was to pay plaintiff five hundred dollars in thirty days as the difference between the values of the properties, but the agreement included other transactions, to be done in the meantime, involving expenditures of money, all of which, together with the item of five hundred dollars first named, were settled together, and a balance of one thousand dollars was thus found to be due plaintiff from defendant, for which defendant then executed his notes. *Held* that, by allowing the five-hundred-dollar demand to be thus blended with other demands, he waived his right to a vendor's lien therefor.

Appeal from Cerro Gordo District Court.—HON. G. W. RUDDICK, Judge.

FILED, FEBRUARY 6, 1890.

79	374
94	107

79	374
136	519

THE plaintiff filed his petition, November 10, 1887, asking judgment against the defendant Smith, on two notes falling due, respectively, December 20, 1887, and February 20, 1888, which he alleges were given for the balance of the purchase price of certain lands described, and praying for a vendor's lien thereon; and also alleging "that nothing but time is wanting for both of said notes to become due and payable." No original notice was ever served or issued in the case; but on December 5, 1887, the defendant Smith appeared and filed his answer, admitting the execution of the notes but denying any indebtedness; denying that the notes, or either of them, were given for a part of the purchase money for said land. Further answering, he says that the notes are not due, and that no cause of action had accrued thereon at the time the plaintiff commenced this action. He also sets up certain matters by way of counter-claims, and prays that the plaintiff's bill be dismissed, and he have judgment on his counter-claim. On May 15, 1888, the plaintiff filed an amendment to his petition, alleging that, since the filing of his petition, the defendant Smith had sold and conveyed the land to one W. C. Tyrrell, who purchased the same with notice of the plaintiff's claim, and asking that Tyrrell be made a defendant, and that his rights in the land be decreed junior to the plaintiff's; also, alleging that, since filing the petition, his notes had become due and payable, and are still his property; and asking judgment thereon. On the same day plaintiff replied to defendant Smith's answer, denying each and every allegation thereof. Thereafter, defendant Tyrrell answered, admitting that he had purchased the land, December 10, 1887, and denying each and every other allegation in the plaintiff's petition and amendment; and denying that the plaintiff is entitled to maintain this action, because no cause of action had accrued to him at the time of the commencement thereof, and asking that plaintiff's bill be dismissed. Upon the issues thus joined, the cause was submitted to the court, and decree

Erickson v. Smith.

entered in favor of the plaintiff against the defendant Smith for \$843.78 and costs, and establishing a vendor's lien as prayed, and declaring the same superior and paramount to all rights and interests of the defendants in said land; from which judgment and decree the defendants appeal.

The evidence discloses the following facts with relation to the giving of the notes sued upon: August 22, 1887, plaintiff and defendant Smith agreed upon an exchange of property, whereby the plaintiff was to exchange his farm for the defendant Smith's dwelling house and elevator property, at Meservey, Iowa. The farm was valued at four thousand dollars, and incumbered for fifteen hundred dollars, which incumbrance Smith assumed. The dwelling house and elevator property were valued at two thousand dollars, and incumbered for five hundred dollars, which Smith was to pay off in thirty days, and the difference of five hundred dollars was to be paid by Smith, in cash, within thirty days. It was also agreed that the business should be conducted by Smith, in his name, for a period of three weeks, and the losses and gains borne by C. A. Erickson, provided the sale was not annulled within thirty days. Up to this time, Smith had transacted business with L. B. Clark & Co., bankers, and with Rosenbaum Bros., to whom shipments were made, and with each of whom he had an open account. He was indebted to Clark & Co. seven hundred dollars, and to Rosenbaum Bros. six hundred and thirty dollars, on these accounts. The incumbrance of five hundred dollars on Smith's property, which he was to remove, was a mortgage to Rosenbaum Bros. as a continuing security for overdrafts, and secured five hundred dollars of this six hundred and thirty dollars' indebtedness. The business was conducted in the name of Smith to September 20, 1887, when the parties had a settlement covering numerous items. Smith did not pay the five hundred dollars in cash as a separate transaction, nor did he remove the five-hundred-dollar incumbrance to

Erickson v. Smith.

Rosenbaum Bros. That incumbrance was satisfied by Erickson's executing his note and mortgage on the same property in satisfaction thereof. Erickson also assumed the indebtedness of Smith to Clark & Co. All of these items were included in the settlement; the results of which showed an indebtedness of \$999.53 from Smith to Erickson, and, upon the completion of this settlement, the notes in suit were given. Appellants' contention is that the notes in suit were not given for the purchase price of the land, and, therefore, plaintiff is not entitled to a vendor's lien; that the plaintiff's action was brought before the maturity of the notes, and cannot be maintained; and that the judgment is for too large an amount.

Nagle & Birdsall, for appellants.

A. R. Ladd and John Jamison, for appellee.

GIVEN, J.—I. The right of vendors of real estate to a lien thereon for unpaid purchase money, though questioned by high authority, and rejected by many of the states, has been recognized in this state since *Pierson v. David*, 1 Iowa, 23. "It is a simple equity, raised and administered by courts of chancery. It is not measured by any fixed rules, nor does it depend upon any particular fact or facts. Each case rests upon its own peculiar circumstances, and the vendor's lien is given or denied according to its rightfulness and equity, in the judgment of the court, upon the facts developed in the particular case." *Porter v. City of Dubuque*, 20 Iowa, 440.

The right to this lien being limited to unpaid purchase money, it will not be sustained when the purchase price has been so blended with other considerations, by the contract or otherwise, that its precise amount cannot be ascertained. "If land and personal property be sold together, under an entire contract, for a gross price, and in the sale there is no agreement of the parties determining what part of the price is for the land

and what part for the personal property, the presumption is that the vendor did not look to the land for payment, but relied exclusively on the personal responsibility of the vendee." 2 Jones, Liens, sec. 1072, and cases cited. Under the agreement Erickson sold nothing but real estate to Smith, and that for a definite and fixed price. At the time of the settlement, when the notes in suit were given, taking the whole transaction between the parties into account, except a few items that were omitted from the settlement, Smith owed Erickson \$999.53, which Smith says they agreed to call one thousand dollars. The statement of that settlement, produced by Erickson, shows that it included the five hundred dollars to be paid in cash in thirty days, and the five hundred dollars which he had assumed to Rosenbaum Bros., the one hundred and thirty-one dollars' balance due Rosenbaum Bros., and the bank account to Clark of seven hundred dollars.

While it is true that the transactions, other than that relating to the real estate included in that settlement, substantially balanced the account between them, leaving the one-thousand-dollar indebtedness as purchase price of the real estate, it is equally true that in making that settlement the parties did not so treat the items, but embraced all of them in the settlement by which the balance due Erickson was reached, and in consideration of which balance the notes in suit were given. Under these circumstances, it is not possible to separate the purchase price of the land remaining unpaid from the other items that enter into the settlement, and say that the notes were given solely in consideration of the balance due on the land. By allowing the items to be thus blended, the plaintiff Erickson is presumed to have waived his right to a lien, and to rely exclusively on the personal responsibility of the vendee.

II. Appellee rests his right to bring this action before the maturity of the notes upon his claim for a vendor's lien, and contends that, being entitled to a vendor's lien, he could thus bring the action so as to

Lee v. The Agricultural Ins. Co.

charge third persons with notice of his claim, as provided in section 2628, Code. Appellee not being entitled to a vendor's lien, it follows that the action was prematurely brought. We do not now decide whether a vendor, entitled to a lien, might bring his action, before maturity of the debt, to charge third persons with notice of his lien, or not. These views render it unnecessary that we consider the question made as to the amount of the judgment. The judgment of the district court is reversed, and the case will be dismissed, without prejudice to the claim of either party, and at the costs of the appellee.

REVERSED.

LEE V. THE AGRICULTURAL INSURANCE COMPANY.

1. **Agency: EVIDENCE.** Where a witness was examined as to his actual authority as defendant's agent, and he stated that he was such agent, and had his authority in writing in his pocket, the writing was the best evidence, and his oral testimony was properly excluded.
2. **Evidence: OPINIONS: WITNESS NOT SHOWN TO BE QUALIFIED.** The opinions of a witness are properly excluded where the witness is not shown to be qualified to give an opinion on the point in question.
3. **Fire Insurance: INCREASE OF RISK BY MORTGAGE.** The mortgaging of insured property, even to secure a debt not due, is an increase of the risk, and there was no error in refusing to submit to the jury in this case the question whether it was or not. (*Russell v. Insurance Co.*, 71 Iowa, 69, distinguished.)

Appeal from Hamilton District Court.—HON. JOHN L. STEVENS, Judge.

FILED, FEBRUARY 6, 1890.

ACTION upon a policy of insurance, insuring certain chattel property against loss by fire or lightning. The policy sued upon contains this provision: "If the property, either real or personal, or any part thereof, shall

79	379
85	651
79	379
495	543
79	379
105	384
79	379
110	384

become incumbered by mortgage, judgment or otherwise, the entire policy, and every part thereof, shall be null and void, unless the written consent of the company, at the Chicago office, is obtained." The defendant answered that subsequent to the execution and delivery of said policy, and prior to the time of said fire and loss, the said insured property, and every part thereof, was by the assured incumbered by mortgage, and that said insurance continued, and remained in full force, until after the time of the fire and loss, and that the written consent of said company, at the Chicago office, to said incumbrance, was never obtained; wherefore said policy became and is void. The plaintiff, in reply, admits the execution of said mortgage, and says it was not in fact a mortgage, because given to secure the plaintiff, as surety for the assured, for one hundred and twenty-five dollars, borrowed money; that at the time of the destruction of said property the plaintiff had not become liable for said debt; that the same was not due, and the instrument not operative as a mortgage; that said mortgage was placed on the property with the consent of the duly-authorized agent of the company, and with his full knowledge. The case was tried to the jury; and at the close of the testimony for plaintiff, the defendant moved to withdraw the case from the jury, and for judgment, which motion was sustained, and judgment entered against plaintiff for costs, from which judgment he appeals, assigning as errors that the court erred in excluding evidence offered by the plaintiff, tending to show that the said mortgage is not regarded by insurance men as increasing the hazard, and that an increase of premium would not be demanded on account of such mortgage; that the court erred in sustaining said motion of defendant, and entering judgment against plaintiff, and in sustaining objections to questions asked of the witness H. S. Lee, by the plaintiff, as to the authority of said witness as agent of the defendant.

Martin & Wambach, for appellant.

Kamrar & Boeye and E. H. Gary, for appellee.

GIVEN, J.—I. On the trial, H. S. Lee was called as a witness by the plaintiff, and, having testified that he was agent for the defendant company, and had countersigned this policy, stated that his authority was from the company, in writing, and then in his possession, in his pocket. Plaintiff then asked the witness: “Have you authority to cancel policies issued by this company at Webster City?” To which defendant objected as incompetent, and which was sustained, and whereupon plaintiff further inquired: “Have you, in the course of your agency here, canceled policies of this company?” which was also objected to for the same reason, and objection sustained. There was no error in sustaining these objections. The writing was the best evidence of the witness’ authority from the company. It may be true, as contended, that, as between a party and third persons, the limit of the agent’s authority to bind the party is the apparent authority with which the agent is invested; yet these inquiries were as to actual authority, and not apparent authority. The writing was the best evidence, and should have been produced.

Plaintiff inquired of the witness, H. S. Lee: “Knowing just what facts you did about this mortgage, you would not consider it as increasing the hazard?” to which defendant objected as incompetent, and not the subject of expert testimony, which was sustained. Plaintiff then offered to prove by the witness that the facts in reference to this mortgage are not regarded by insurance men as an increase of hazard, which was also objected to, for the same reasons, and objection sustained. In *Russell v. Insurance Co.*, 78 Iowa, 216, we held that, on a question as to whether a certain use of a barn increased the risk, the opinion of the witnesses was proper to be taken. It is, however, sufficient answer to these objections that it was not made to

1. AGENCY: evidence.

2. EVIDENCE: opinions: witness not shown to be qualified.

appear that the witnesses had any knowledge or experience with regard to hazards, or as to what was considered by insurance men as increasing hazards. The objections were properly sustained.

II. Appellant's further contention is that it was a question of fact as to whether the giving of the chattel mortgage increased the risk, or decreased the defendant's security, and that this question should have been left to the jury.

3. FIRE INSURANCE: INCREASE OF RISK BY MORTGAGE.

The case is clearly distinguishable from that *Russell v. Insurance Co.*, 71 Iowa, 69. In that case incumbrances existed at the time the policy was issued. The incumbrances were changed during the life of the policy by payments and renewals, and a part of the land had been sold. Hence it was a question of fact as to whether the hazard had been increased or security decreased. But there is no question in this case. The giving of the chattel mortgage is, beyond question, an increase of the risk, and a decrease of the defendant's security, because thereby the assured lessened his interest in the insured property. It makes no difference that a right of action had not accrued upon the mortgage. It was a depletion of the assured's interest in the property, to the extent thereof, from its execution and delivery.

III. Appellant contends that it should have been left to the jury to say whether the defendant's agent Lee did not have such knowledge of the giving of the mortgage as constituted a waiver on the part of the defendant. As requested, we have read the whole of the testimony of this witness; and we fail to gather therefrom that the witness desires to be understood as saying that he had any knowledge of the giving of the mortgage at the time it was given, or to have given any consent thereto. But, if he had, there is an entire absence of testimony tending to show that the defendant would be bound by such knowledge or consent, as the extent of Lee's authority is not made to appear. We find no error in the action of the district court, and the judgment is, therefore,

AFFIRMED

Mickley v. Tomlinson.

MICKLEY V. TOMLINSON *et al.*

1. **Appeal: NOTICE: DELAYING TIME FOR HEARING: PRACTICE.** An appeal will not be dismissed because the notice of appeal stated that the cause would be heard at the second term of this court after service of the notice, when the first term after service began more than thirty days after such service. In such case, the appeal was for hearing by operation of law at the first term (Code, secs. 3180-3182), and the statement in the notice that it would be heard at the second term was mere surplusage. If appellant did not have his case ready at the first term, the appellee had the right to file the transcript at that term and have the judgment affirmed or the appeal dismissed, under the statute and the rules of court.
2. **Judgment on Default: NOT WARRANTED BY PETITION: REMEDY OF DEFENDANT.** Where plaintiff, upon the default of defendant, was awarded relief to which he did not show himself entitled by the averments of his petition, and which he did not demand, *held* that plaintiff had the right to have the judgment modified upon motion for that purpose, and that he had a right to appeal from an order overruling his motion.
3. **Mortgages: SALE OF PART OF THE PROPERTY: FORECLOSURE: PRIORITIES.** Where one tract of land was mortgaged to plaintiff to secure all of five notes, and a second tract was mortgaged to him to secure the first note only, and the mortgagor afterwards sold the second tract to defendant, in an action to foreclose both mortgages, *held* that the first tract should be sold first, and the proceeds applied first to satisfy the first note, and that the second tract should be sold, if at all, only to satisfy such portion of the first note as was not satisfied by the sale of the first tract;—the rule being that, when a mortgagor sells and conveys a part of the mortgaged property, and retains the ownership of a part, the part he continues to own shall be first sold, and the part conveyed by him shall, in the hands of his grantee, or those claiming under him, be subject to sale only to satisfy any balance remaining after sale of the property retained by the mortgagor. (See *Massie v. Wilson*, 16 Iowa, 390, and *Bates v. Ruddick*, 2 Iowa, 423.)

Appeal from Plymouth District Court.—HON. SCOTT
M. LADD, Judge.

FILED, JANUARY 19, 1889.

79	383
85	97
79	383
98	434
79	383
102	403
79	383
105	385

PLAINTIFF sold lot 1, block 5, in the city of Le Mars, to defendant Joseph W. Hough, for the agreed price of five thousand dollars. Hough executed five promissory notes, of one thousand dollars each, for the price, and to secure the same gave a mortgage on the property; also upon lot 9, in block 33, in Le Mars. The mortgage specified that the last-named property was pledged as security only for the note first falling due. Hough subsequently sold lot 9, block 33, to defendant F. M. Tomlinson; the mortgage being of record at that time. Default having been made in the payment of the notes, plaintiff brought suit for the foreclosure of the mortgage, making both Hough and Tomlinson defendants. Neither of them answered, and judgment was entered by default against Hough for the amount of the indebtedness, and certain taxes which plaintiff had paid on the mortgaged property, and foreclosing the mortgage against both defendants; the judgment providing for the sale of all of the mortgaged property for the payment of the debt. The subsequent sale of lot 9, block 33, to Tomlinson was shown by the petition. After the rendition of the judgment he appeared, and moved the district court to modify the decree, and make it provide for the sale of lot 1, block 5, for the satisfaction of the whole indebtedness, and for the sale of the other property only in case some portion of the note first falling due should remain unsatisfied. The court overruled the motion, but on its own motion modified the judgment, making it provide for the sale of lot 9 for the satisfaction of any portion of the judgment remaining unsatisfied after the other property was exhausted. From the order overruling the motion, and the judgment as modified, defendant Tomlinson appeals.

J. H. Struble, for appellant.

T. M. Zink, for appellee.

1. **APPEAL:**
notice: de-
laying time
for hearing:
practice.

REED, C. J.—I. The notice of appeal was served on the sixth day of January, 1888, and recited that the cause would be for hearing at the June term following. The statute in force at that time provided that terms of this court should be held in March, June, October and December of each year. That statute was subsequently repealed, and it was provided that the terms should be held in January, May and October. Chapter 34, Laws 22d Gen. Assem. Appellee filed a motion to dismiss the appeal on the ground that more than thirty days elapsed between the service of the notice and the next term of the court as fixed by law, while the appeal was to the term following that. The motion will be overruled. It is true appellant could not carry the case over to the June term simply by declaring in the notice of appeal that it would be for hearing at that term. When the appeal was perfected, this court acquired jurisdiction of it, and the statute fixed the time at which it could be heard. All causes which have been appealed more than thirty days before a term of this court are for hearing at that term, unless continued by consent or for cause (Code, secs. 3180–3182), and an appellant cannot change the rule in that respect by a mere declaration in his notice of appeal. The recitation in appellants' notice that the case would be for hearing at the June term did not affect either the appeal, or the time at which it could be heard, but was mere surplusage. There was nothing to prevent the appellee from filing the transcript at the next term after the service, and moving for the affirmance of the judgment, or the dismissal of the appeal, under the statute and rules of the court. That course, however, was not taken, but the record was subsequently filed by appellant, and the cause must now be disposed of on its merits.

II. On its face the judgment as modified is erroneous. By the terms of the mortgage, lot 9 was pledged as security for but one thousand dollars of the indebtedness, whereas by the judgment it is directed to be sold

Mickley v. Tomlinson.

for the satisfaction of any balance which may remain after the other property has been exhausted. If the proceeds derived from the sale of the other property should satisfy but three thousand dollars of the indebtedness, and it should sell for two thousand dollars, the whole of that amount would, under the judgment, be applied upon the indebtedness. It is clear, therefore, that the judgment ought to be modified if the state of the case is such that that can be done.

It was contended, however, that, as appellant showed no excuse for his default, he could neither move for the modification of the judgment, nor have it reviewed on appeal. That position would doubtless be correct, if appellant were seeking to interpose a defense, or to secure the modification of the decree upon some ground not shown by the record. But he is not attempting to do that. The facts upon which he bases his claim for relief are all shown by plaintiff's petition. The mortgage was attached as an exhibit, and the fact that appellant was a subsequent purchaser was shown by proper averment. The error in the judgment consists in the fact that plaintiff is awarded relief to which he did not show himself entitled by the allegations of his petition and which he did not demand. Upon the allegations of the petition, he was entitled to judgment for the sale of the property purchased by the appellant, for the satisfaction of one thousand dollars of the indebtedness, provided that amount remained unsatisfied after the other property was exhausted, and, if not, for the remainder less than that, whatever it might be. Against that claim appellant had no defense, and consequently he had no occasion to make any appearance. On that state of facts it is clear, we think, that he was entitled to appear after the judgment, and move for its modification. If that were not true, it would follow that, although he had no defense against the claim, as made in the petition, he is without remedy against the judgment erroneously rendered upon it, under which his

2. JUDGMENT
on default:
not warrant-
ed by peti-
tion: remedy
of defendant.

Mickley v. Tomlinson.

property may be appropriated for the satisfaction of a portion of a debt which was not a lien upon it when he purchased. That such a result would be inequitable is manifest; and it is equally clear, we think, that a party cannot be denied relief against a judgment which would lead to such results, and which is not warranted by either the averments or the prayer of the petition. The judgment will, therefore, be reversed, and a new judgment will be entered, either in this or the district court, as the parties may elect, granting the relief to which plaintiff, on the allegations of his petition, is entitled.

REVERSED.

OPINION ON REHEARING.

[FILED, FEBRUARY 6, 1890.]

BECK, J.—A rehearing upon the petition of plaintiff was allowed, and the cause has been again argued. We

8. MORTGAGES:
 sale of part of
 the property:
 foreclosure:
 priorities.

reach the same conclusion as upon the former consideration of the case, namely, that the judgment of the court below ought to be reversed; but we think that

relief differing in some respects from that indicated in the foregoing opinion ought to be granted. The mortgage in the suit, after the usual words of conveyance, contains the description of the property mortgaged and certain conditions, in the following language: "Lot number one (1), in block number five (5), in the city of Le Mars, in said county and state; also to secure the payment of the first note hereinafter described, lot number nine (9), in block thirty-three (33), in said city of Le Mars, in said county and state, subject to the first mortgage of five hundred dollars running to John Blodget, due December 1, 1888, and assigned to T. C. Woodman. This mortgage is given to secure the balance of purchase money of lot 1, block 5, Le Mars, Iowa." The conditions of defeasance in the mortgages are expressed as follows: "Provided always, and these presents are upon the express condition that

Mickley v. Tomlinson.

if said Joseph W. Hough and Minerva Null Hough, their executors or administrators, shall pay, or cause to be paid, to Stephen B. Mickley, his heirs or assigns, the sum of one thousand dollars on or before the eleventh day of October, 1887; one thousand dollars on or before October 11, 1888; one thousand dollars on or before October 11, 1889; one thousand dollars on or before October 11, 1890; and one thousand dollars on or before October 11, 1891,—with interest thereon at the rate of eight per cent. per annum, annually, payable at Le Mars National Bank, Le Mars, in the state of Iowa, according to the tenor and effect of five notes of even date herewith; and all sums hereafter provided to be paid, at the time or times provided or agreed upon herein; and shall well and truly keep and perform all and singular the covenants and agreements herein, and in the notes secured hereby, on our part to be kept and performed—then these presents shall be null and void; otherwise to be and to remain in full force and effect.”

Lot 5, under this mortgage, is held in security for the payment of all the notes. Lot 9 is held as security for the payment of the first one. It is the case of two separate tracts of land or lots, held for the payment of a debt. We need not inquire here, in the view we take of the case, as to the manner of enforcing the lien of the mortgage upon the lots, and whether lot 5 must be first sold, and proceeds applied to the first note, and whether lot 9 can be sold only for a balance remaining unpaid after the sale of lot 5. The mortgagor sold lot 9 to Tomlinson. Now, it is a well-settled rule that when a mortgagor sells and conveys a part of the mortgaged property, and retains the ownership of a part, upon foreclosure of the mortgage, the part he continues to own shall be first sold, and the part conveyed by him shall, in the hands of his grantee, or those claiming under him, be subject to sale only to satisfy any balance remaining after the sale of the property held by the mortgagor. *Massie v. Wilson*, 16 Iowa, 390; *Bates v. Ruddick*, 2 Iowa, 423. This rule is based upon obvious equities.

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The decree in this case, upon facts disclosed by the abstract stated herein and in the foregoing opinion, should provide for a judgment upon all the notes, and determine the sum due upon the first one, and that lot 5 be sold first. If it is not sold for enough to pay the first note, then lot 9 shall be sold, and the proceeds of the sale thereof shall be applied to the balance remaining after the application of the proceeds of the sale of lot 5 to the payment of the amount due on the first note. In case lot 5 sells for enough to pay the first note, lot 9 will not be sold, but will be discharged from the lien of the mortgage and the decree. In case of the sale of lot 9, and it realizes a sum more than sufficient to pay the balance due on the first note, after the sum realized from lot 5 is applied thereon, any balance remaining shall be paid to defendant Tomlinson. No objections are made to the first point of the foregoing opinion. The cause will be remanded to the court below for a decree in harmony with this opinion. **REVERSED.**

**PENCE V. THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY**

1. **Railroads: COLLISION AT HIGHWAY CROSSING: NEGLIGENCE: EVIDENCE.** Plaintiff, riding in a wagon, was about to cross defendant's two lines of railroad which were only eighty feet apart. He testified that before reaching the first crossing he stopped and looked and listened for trains, but saw and heard none; that just as he cleared that crossing a train rushed by on that track, and that another, which was rapidly approaching on the second track, collided with his team and wagon and severely injured him. The evidence is reviewed (see opinion) and *held* to be conflicting as to obstructions which might have prevented plaintiff from seeing the approaching trains; also, as to the speed of the trains, and as to whether proper signals were given by them as they approached the crossings; wherefore it was properly submitted to the jury, whose verdict thereon cannot be disturbed in this court.
2. ———: ———: **TWO TRACKS AND TRAINS.** In such case it was proper to consider together the matters involved in the operation of the two trains.

79	389
88	26
79	389
116	73
79	389
128	852
79	389
126	233
126	237
126	643
79	389
141	627

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3. ———: ———: **SPEED OF TRAINS: EVIDENCE.** In such case, a witness who resided in the locality of the accident, and was familiar with the running of trains, and saw the trains in question pass, was competent to testify to their speed.
4. ———: ———: **NEGLIGENCE: INSTRUCTIONS AS TO SEPARATE ALLEGATIONS.** In such case it was not the duty of the court to point out each matter alleged as negligence, and to designate all the evidence which could properly be considered in connection with it, for such course would have made the charge so intricate and lengthy that it would have been as likely to confuse as to instruct the jury.
5. ———: ———: **INSTRUCTIONS AS TO OBJECTS OBSTRUCTING VIEW: ASSUMPTION OF FACTS.** In such case the court instructed as follows: "Evidence has been introduced as to the existence of trees, fences and other objects upon the right of way of defendant; also, of the condition of the highway at different points near and over said crossing. You are instructed that said condition of the highway, and the existence of such objects in the right of way, if you find said objects did exist, and that the condition of said highway has been shown, did not constitute negligence on the part of the defendant, but are competent as proving the degree of care which should be exercised by the defendant, and also by the plaintiff, in approaching said crossing." *Held* not erroneous, though the evidence did not show any obstruction on the right of way;—the vital matter being, not whether they stood on the right of way, but how far they obstructed the view.
6. ———: ———: **EVIDENCE, AFFIRMATIVE AND NEGATIVE: WEIGHT.** In such case an instruction was properly refused which charged that "affirmative testimony, as that a bell was rung or a whistle sounded, is entitled to more weight than negative testimony, as that a bell or whistle was not heard," because it ignored the comparative credibility and means of knowledge of the witnesses.
7. **Practice: ARGUMENT TO JURY: REFERRING TO MATTERS NOT OF RECORD: OBJECTION TOO LATE.** In this case there were many witnesses, and some of them were not present, and the transcript of their testimony at a former trial was introduced. Plaintiff's counsel, in addressing the jury, commented upon the testimony of two witnesses at the former trial, which was not introduced on this trial; but this he did by mistake as to the fact, and defendant's counsel, though present and knowing what was being done, made no objection. *Held* that the error could not, on appeal, be urged as a ground for reversal.
8. **Verdict: SPECIAL INTERROGATORIES: INDEFINITE ANSWERS.** Where the general verdict could not have been controlled by any answers that might have been made truthfully to special interrogatories, the fact that some of them were not answered accurately, and others not answered at all, is no ground for reversal.

Pence v. The Chicago, R. I. & P. Ry. Co.

9. ———: PERSONAL INJURY: AMOUNT. Where a physician with a life expectancy of twenty-three years, and with a practice worth from twelve hundred to fifteen hundred dollars per year, was almost totally disabled by defendant's negligence, and incurred great suffering and expense on account thereof, a verdict for twenty-four thousand dollars' damages, nine thousand dollars of which was remitted to avoid a new trial, was not so large as to evince passion or prejudice on the part of the jury,—no improper motives being apparent.

Appeal from Polk District Court.—HON. MARCUS KAVANAGH, JR., Judge.

FILED, FEBRUARY 6, 1890.

ACTION to recover damages resulting from personal injuries for which defendant is alleged to be responsible. There was a trial by jury, and a verdict for plaintiff for the sum of twenty-four thousand dollars. Defendant filed a motion for a new trial, and the district court ordered that unless plaintiff remitted of the verdict the sum of nine thousand dollars, and accepted a judgment for fifteen thousand dollars, the motion for a new trial should be sustained. The plaintiff thereupon elected to remit nine thousand dollars, the motion was overruled, and a judgment was rendered in favor of plaintiff for fifteen thousand dollars and costs. The defendant appeals.

T. S. Wright and Cummins & Wright, for appellant.

Parsons & Perry, for appellee.

ROBINSON, J.—The injuries in question were received on the thirtieth day of October, 1878. At that time, defendant was engaged in operating two lines of railway, which extended eastward for some distance from Des Moines. One of them was known as the Chicago, Rock Island and Pacific railway, and the other as the Keokuk and Des Moines railroad. The first was commonly designated as the "Rock Island," and the other as the "Keokuk" road. The latter was south

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of and, for several miles eastward of Des Moines, substantially parallel to the former. A highway known as the "Rising Sun Road" also led eastward from Des Moines, near the tracks of said railway, until it crossed them, at an acute angle, a short distance east of a building known as the "Greever House." That house stood between the Keokuk track and the highway south of it, about four hundred and eighty feet west of the point where the latter crossed the former. It was about twenty by thirty feet in size, and stood fifty-four feet north of the highway, and its northeast corner was thirty-nine feet from the south rail of the Keokuk track, at its nearest point. At the time in question, there were numerous trees, some out-buildings, a fence and hedge between the north line of the house produced eastward and the Keokuk track, in the vicinity of the house. A short distance west of the Greever house the two railway tracks curved slightly, and, before reaching the line of that house, began to trend southward, and continued in that direction until after the line of the highway was crossed. For more than a quarter of a mile west of the crossings, the railway tracks are but eighty feet apart, west of the Greever house; and between the Keokuk track and the highway there were buildings and other objects, which, in places, obstructed a view of the railway tracks from the south.

Late in the afternoon of the day named, plaintiff and one Crews left Des Moines in a common farm-wagon, drawn by a mule team, which was driven by Crews. It was nearly or quite dark when they approached the Greever crossing by the Rising Sun road. They stopped before reaching the first track and listened and looked for trains, then drove over the Keokuk track. Just after they crossed, a train passed over it from Des Moines, and another was seen approaching from the same direction on the Rock Island track. It is claimed that their team then became frightened, and could not be controlled; that it ran eastward along the highway, and when near the east crossing was

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struck by the Rock Island train, and that the injuries of which plaintiff complains were the result of the collision.

Plaintiff claims that the defendant's roads were negligently located and constructed west of the Greever crossings, and that they were hidden from view in places by obstructions of various kinds; that ordinary prudence required them to have a flagman at the crossings, but that it negligently failed to do so; that the crossings were improperly located and constructed; that they were not of sufficient width; that ditches were dug at the sides of the Rock Island crossing, leaving a strip less than twelve feet in width for the crossing. Negligence in locating and constructing cattle-guards and fences, and in permitting obstructions to exist on its right of way, and near to the tracks, which prevented the seeing of its trains from a point near the crossings, and in failing to repair the crossings, is also charged. It is further claimed that the trains in question were run at a high and improper rate of speed; that proper signals were not given; that a whistle was blown at an improper time, which frightened the team Crews was driving; that the employes of defendant on the Rock Island train saw and knew the danger to which plaintiff was exposed, but made no effort to avoid the collision; that, on the contrary, the engineer of that train wrongfully increased the speed of the train, and sounded the whistle; and that the injuries of plaintiff were the consequences of the alleged negligent and wrongful acts on the part of defendant. The answer admits that defendant operated the two roads at the time charged, and denies all grounds of liability alleged.

This case has been in this court before. For the opinion in the former appeal, see 63 Iowa, 747. We have deemed it important to set out the facts involved in this appeal quite fully, for the reason that the case, as now presented to us, is in several particulars materially different from that formerly considered.

I. Counsel for appellant discuss at length the evidence, and insist that it shows that plaintiff was

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1. RAILROADS : guilty of contributory negligence, which
collision at resulted in the injuries complained of, and
highway
crossing : neg- that defendant was free from all negligence.
ligence : evi-
dence.

The plaintiff claims, and there is evidence which tends to show, the following facts: Plaintiff and Crews approached the Greever crossing on the Rising Sun road, going east, at about dark of the day named. Before reaching the first crossing, they stopped at least twice to look and listen for approaching trains. The last time they so stopped, they were within from fifty to sixty feet of the west crossing. They looked along the tracks towards Greever's house, but neither saw nor heard anything of approaching trains. The team was then started at a slow trot across the track. When it had about reached it, plaintiff saw a flash from the headlight of an approaching locomotive, and, before the wagon had cleared the track more than a few feet, a passenger train went by at a high rate of speed. When the locomotive was about at the crossing, it whistled, thereby frightening the mules Crews was driving, and they commenced to run towards the east crossing. The distance between the two crossings was two hundred and sixteen feet. When the mules commenced to run, a train was approaching the east crossing, on the north track, from the west. The engineer in charge of the engine of that train saw the team, and thought it was trying to cross the track ahead of the train. He saw that the team was scared and unmanageable. When he saw them he was about three hundred feet from the crossing, and the team was about midway between the crossings, or about one hundred and ten feet from the east crossing, towards which it was going at a rapid pace. He says: "I saw this; and that if I undertook to stop my train there was no possibility, in any way, of saving the lives of the men, whoever they were, on that wagon, and consequently dropped my engine right down, and gave her all the steam I could, so as to clear that crossing before they could get there. or head them off; but they got down to the open place next to

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the cattle-guard, and the mule on the near side got there just in time to strike the bumper of my engine. * * * The bumper * * * is the timber that runs out on the cow-catcher." One mule was killed, the wagon was overturned, and plaintiff was thrown out, and severely injured. Before the east crossing was reached, plaintiff had attempted to aid Crews in controlling the team, but without avail. No whistle was blown, nor bell rung, until after the first track had been crossed.

Appellant insists that the preponderance of the evidence is with it on most of the material issues; that it is shown by mathematical demonstrations that an engine on the Keokuk track could have been seen from the highway, at the point where plaintiff claims to have stopped last before making the first crossing, for a distance of at least thirteen hundred feet westward, and that it was not possible for the train, even if it was running at the speed claimed by appellee, to have reached the crossing as soon as he claims that it did after the team started to cross. It must be admitted that there is much to support this claim of appellant. But several witnesses testified that the Keokuk train was running at least thirty-five miles an hour, and that no signals were given, or at least heard by those who were near enough to hear, until after the crossing on the Keokuk road was reached. The evidence as to the obstructions which tended to hide the track from plaintiff's last stopping-place was conflicting. Witnesses do not agree as to the location of the fences, the number and sizes of the out-buildings, the number and sizes of the trees, and the hedge, at Greever's place. Even if it be conceded that the stumps of the trees—which have been cut down since the accident happened—are accurately located, the height to which the trees were trimmed, and at which the spread of the branches begins, is not definitely shown. Therefore, we cannot say that the jury should have considered the positive testimony of the plaintiff and Crews, that they stopped and listened within the distance claimed, of the crossing, and that

they could not see anything on the tracks, overcome by the testimony which shows that a few years after the accident, and after trees had been cut down, and buildings and fences had been removed, an engine on the tracks could have been seen thirteen hundred feet westward from the plaintiff's last point of sight; the line of sight being north of the supposed site of the trees.

There are other points of conflict: The plaintiff, and at least two disinterested witnesses, testify that the Keokuk train was a passenger train, although one says it contained some freight cars. The men who claim to have been on the train, the men who were on the other train, and Crews testify that it was a freight train. The men also testify that the proper crossing signals were given, and thus contradict the witnesses for plaintiff. If the case were triable here *de novo*, we should not reach the conclusion the jury did in regard to several material issues. Some of those conclusions seem to us to be contrary to the weight of the evidence, as it appears in the record. But we cannot set aside the verdict on that ground without usurping the functions of the jury. The weight of the evidence is not so clearly against the findings of the jury as to authorize us to set aside the verdict, and overrule the court below in refusing a new trial on that ground. If defendant's train approached the Greever crossings at a high rate of speed, without the proper signals, defendant was liable for negligence, if damage resulted. If the engineer of the Rock Island train, when he saw the team between the tracks, should, in the exercise of reasonable care and diligence, have reversed his engine, and whistled for brakes, the defendant was liable for the damages which resulted from his failure to do so. It may be that he resorted to the means which seemed to him best to avoid an accident, but there is ground in the evidence for believing that, if, when he first saw that the team was trying to make the crossing ahead of his engine, he had used all the appliances available for checking the speed of the train, the accident would have been avoided.

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II. It is insisted that the matters involved in operating the train on the north track should have been considered separately from those connected with operating the train on the other, but we do not think that should have been done.

2. —:—:
two tracks
and trains.

If plaintiff's claim be well founded, he would not have crossed the first track before the train, and thus would have escaped injury, or, having crossed it, the team would not have become frightened and unmanageable, if the Keokuk engine had not negligently whistled when it was on the crossing and close to it. It is unnecessary to consider other conclusions which the jury might have reached from the evidence.

III. Questions are raised as to the rulings of the court on the admission of evidence. We have examined them, and think the rulings were correct, or that they related to matters of such trifling importance that no prejudice could have resulted. The most important question thus raised refers to the competency of a witness to testify to the speed at which the trains in question were running. The witness was a resident of the locality, was familiar with the running of trains, and had an opinion as to the speed of those in controversy. We think his evidence was competent.

3. —:—:
speed of
trains: evi-
dence.

IV. Appellant contends that a grave error of the court was its failure "to analyze the allegations with respect to negligence, and direct the attention of the jury to the evidence which should be considered in support of the several averments." It is said that some of

4. —:—:
negligence:
instructions
as to separate
allegations.

the matters alleged to constitute negligence were remote, and the jury should have been so instructed; that the court erred in grouping together in its charge substantially all the allegations of the petition in regard to negligence; that it should have omitted the immaterial and unsupported charges; and that the charge was inaccurate as to some of its attempted statements of fact. We think it was proper for the charge to state

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the claims of the plaintiff fully. The claims made by him necessarily required a lengthy statement of facts. We do not think it was either practicable or desirable for the court to point out to the jury each separate claim, and the evidence which might properly be considered in connection with it. Some of the alleged negligence related to the south track, some to the north, and some to both. Many of the circumstances which were relied upon to show negligence were so related that it would have been erroneous to treat them as separate and distinct from each other. The jury were instructed, in regard to some of the matters alleged as negligence, that they could not be considered, excepting to show the degree of care which plaintiff should have exercised in approaching the crossings, and which defendant should have used in operating its trains. If the charge had pointed out each matter alleged as negligence, and had designated all the evidence which could be properly considered in connection with it, it would have been necessarily so intricate and lengthy that it would have been as likely to confuse as to instruct the jury. The issues seem to have been fairly submitted to the jury. There were some statements in the charge which were not entirely accurate, but they were largely in the nature of mere clerical mistakes, easily understood, and not of a nature to mislead, or cause prejudice.

V. The court charged the jury as follows: "Evidence has been introduced as to the existence of trees, fences and other objects upon the right of way of defendant; also, of the condition of the highway at different points near and over said crossing. You are instructed that said condition of the highway, and the existence of such objects in the right of way, if you find said objects did exist, and that the condition of said highway has been shown, did not constitute negligence on the part of the defendant, but are competent as showing the degree of care which should be exercised by the defendant, and also by the plaintiff, in approaching said

5. —: —:
Instructions
as to objects
obstructing
view: as-
sumption of
facts.

crossing." Appellant complains of this instruction on the ground that the evidence did not show that any of the obstructions named were within the right of way; that, although it was shown that the right of way was one hundred feet wide, and that the obstructions were within fifty feet of the center of the track, yet there is no presumption that the track was located in the center of the right of way. The jury were told, however, that if there were such obstructions on the right of way, that fact would not constitute negligence on the part of defendant. Therefore no prejudice could have resulted. The real question was whether, in view of their proximity to the track, the plaintiff and defendant exercised due caution in approaching the crossing. The vital matter was not whether they stood on defendant's right of way, but how far these obstructed the view.

VI. Appellant complains of the refusal of the court to give an instruction asked in language as follows:

6. —:—: "In the consideration of the evidence, affirmative testimony, as that a bell was rung or a whistle was sounded, is entitled to more weight than negative testimony, as that a bell or whistle was not heard." The instruction ignores the fact that, in weighing such testimony, the comparative credibility and means of knowledge of the witnesses should be considered. If the witness who gave the negative testimony was where he would have heard the bell, had it been rung, or the whistle, had it been blown, his evidence would have been entitled to as much weight as that of a no more credible witness who, by reason of distance, location on the moving train, or other cause, would be less likely to hear or notice the sounds in question.

VII. Appellant asked that forty-four instructions be given the jury, and now insists that the court erred in refusing to give nearly all of them. We find it unnecessary to review each instruction separately. So far as they were correct and important, they were substantially included in the charge given.

Pence v. The Chicago, R. I. & P. Ry. Co.

VIII. In making the closing argument to the jury, one of the attorneys for plaintiff referred to, and commented at some length upon, the testimony of two witnesses as shown by a transcript of their testimony given on the former trial. This testimony was not offered on the last trial; and appellant complains of the course pursued by the attorney, and insists that it was prejudicial misconduct. It appears that a large number of witnesses, who testified on the first trial, did not appear personally at the second, but that a copy of their testimony, as disclosed by the record, was read to the jury. It appears that the testimony of the two witnesses in question was not formally offered on the second trial, but that the attorney for plaintiff supposed that it had been, and so treated it. It also appears that the attorney for defendant knew that he was so treating it, but made no objection. We think, in view of these facts, the attorney for plaintiff was not guilty of such misconduct as to require a reversal of the judgment. It is true, he should have known what evidence was offered; but many witnesses were examined orally, and the depositions or transcripts of the testimony of many others read. It was not an unnatural mistake for him to make; and we think, under these circumstances, it was incumbent upon defendant to call the attention of the attorney to the mistake, by an objection or otherwise, before it could be heard to complain.

IX. The jury returned a number of special findings, some of which are criticised by appellant. The first is as follows: "How far westerly from the crossing of the Keokuk & Des Moines track would an engine, or its headlight, be visible to a person in a wagon fifty feet from said crossing, westerly on the highway, upon the night in question? *Answer.* A little east of Greever's house." To interrogatories as to the rate of speed at which the trains were running at the time of the accident, the jury answered: "Fast." To two other interrogatories the

7. PRACTICE:
argument to
jury: refer-
ring to matters
not of record:
objection too
late.

8. VERDICT:
special inter-
rogatories:
indefinite
answers.

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jury answered, in substance, that they "didn't know." Some of the interrogatories to which these answers were returned related to matters which were immaterial, and the general verdict could not have been controlled by any answers which could have been truthfully made to any of them. It was not necessary for the jury to find facts which would have enabled them to answer the interrogatories which they did not attempt to answer in order to arrive at a correct general verdict. Therefore, we will not disturb the judgment because the special findings were not so full nor so accurate as they might have been.

X. We have examined all the questions discussed by counsel, and have referred to all which seemed to require special mention. Appellant has placed most stress upon the claim that the verdict and special findings were not supported by the evidence, and that the jury were influenced by passion or prejudice in its deliberations and conclusions. As already stated, we do not think the verdict was unsupported by the evidence. Although the amount of the verdict was large, it does not appear that it was the result of passion or prejudice. At the time of receiving the injuries complained of, the plaintiff was a practicing physician and surgeon, whose income from his profession was from twelve to fifteen hundred dollars per year. He was almost totally disabled by his injuries, and can earn now but two or three hundred dollars per year. His expectation of life when the injuries were received was twenty-three years. He incurred much expense, and suffered great pain, in consequence of his injuries. In fixing the amount of their verdict the jury were no doubt influenced by the facts we have recited. Hence improper motives are not apparent. Our conclusion is that the judgment of the district court should be

9. VERDICT :
personal in-
jury : amount.

AFFIRMED.

STORY V. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY
COMPANY.

1. **Evidence: CONFLICT: CIRCUMSTANCES TO BE CONSIDERED.** It is the duty of courts and juries to consider the reasonableness of the testimony of witnesses, and to weigh probabilities founded upon circumstances surrounding the transactions in dispute, and to apply the common experience of mankind, in determining questions of fact. And so, in an action for the killing of horses upon a depot ground by the alleged running of a train at an unlawful speed in excess of eight miles per hour, where one witness testified that the train in question crossed the ground at the rate of twenty-five miles per hour, but four trainmen and the night operator at the depot all testified positively that the speed did not exceed eight miles per hour, but the one witness was strongly corroborated by the physical circumstances connected with the casualty, and which were plainly visible after the accident, *held* that a verdict based upon the truthfulness of his testimony could not be disturbed on appeal for want of evidence to sustain it.
2. **Railroads: UNLAWFUL SPEED AT STATIONS: KILLING OF ANIMALS BEYOND THE GROUNDS: PROXIMATE CAUSE.** Where, by the unlawful speed of a train upon station grounds, animals at large thereon are stampeded, and they run upon the track beyond the grounds, whether by breaking down fences or otherwise, and without checking the speed of the train they are run down and killed, the unlawful speed of the train may fairly be said to be the proximate cause of the injury, and the company is liable therefor. (*Monahan v. Railway Co.*, 45 Iowa, 523, *distinguished*.)
3. ———: **INJURY TO STOCK AT LARGE: HERD LAW: DUTY OF STOCK OWNER.** In an action for negligently killing horses which were at large upon a railroad track, in a county where the herd law was in force, if the owner of the horses had them enclosed in a field with a fence reasonably sufficient to prevent them from escaping therefrom, he was not chargeable with contributory negligence from the fact that the fence was not actually sufficient to restrain them. (See opinion for citations.)
4. ———: ———: **SUFFICIENCY OF FENCE: EVIDENCE.** Where the question in dispute was whether the fence was reasonably sufficient to restrain the horses which it was conceded escaped through the fence, evidence to the effect that the fence was not in fact sufficient was immaterial.

Appeal from Clinton District Court.—HON. A. J.
LEFFINGWELL, Judge.

Story v. The Chicago, M. & St. P. Ry. Co.

FILED, FEBRUARY 6, 1890.

THIS action was brought by the plaintiff, Joseph Story, as assignee of one John Powers, to recover damages for the value of certain horses which it is alleged were killed and injured on the line of the defendant's railroad by reason of the negligent operation of a locomotive engine and train of cars. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals.

A. L. Bartholomew and E. S. Bailey, for appellant.

W. C. Grohe, for appellee.

ROTHROCK, C. J.—I. The injury of which plaintiff complains occurred at Brown's Station, on defendant's railroad. Some time during the night of October 15, 1886, thirteen head of horses, belonging to plaintiff's assignor, Powers, escaped from his enclosure, and wandered off to Brown's Station, a mile or a mile and a half distant. In the morning Powers followed the track of his horses down to the station, and found that a train running from the east to the west had, by collision with the animals, killed one of them outright, and injured four others so that they had to be killed, and that two others were slightly injured. It is not disputed that the injuries to the horses were inflicted by reason of the passage of a freight train over the road from east to west, at about four o'clock in the morning. The negligence charged in the petition is that the train was run through the depot grounds at Brown's Station at a greater rate of speed than eight miles per hour, and that by reason thereof the engine struck, injured and killed the horses. Section 1289 of the Code provides that "the operating of trains upon depot grounds necessarily used by the company and public, where no fence is built, at a greater rate of speed than eight miles per hour, shall be

1. EVIDENCE:
conflict: cir-
cumstances to
be considered.

deemed negligence, and render the company liable, under this section. A material question in the case is whether the speed of the train through the depot grounds exceeded eight miles an hour. The jury, in answer to a special interrogatory, found that the rate of speed was greater than eight miles an hour. It is contended by counsel for appellant that this finding is contrary to the evidence, and that there is not a scintilla of evidence to sustain it. The plaintiff introduced a witness named Grossman, who testified that he slept that night in a room over his store, about two hundred and twenty feet from the depot; that he heard the train coming, and went to the window of his room, and looked at the train; and that it passed through the depot grounds at the rate of twenty-five miles an hour. On the other hand, four trainmen and the night operator at the depot all testified positively that the speed of the train did not exceed eight miles an hour. It is to be admitted that the preponderance of the evidence, so far as the oral testimony of witnesses to the transaction is involved, was with the defendant; and it must be conceded that the testimony of Grossman was not entirely consistent, and he did not appear to be an expert in determining the speed of a moving body. But we think he was strongly corroborated by the physical circumstances connected with the casualty, and which were plainly visible after the accident. One of these circumstances is that in some way the train in question ran down and injured seven horses. Five of these were killed or injured by actual contact with the train. The jury found that three of them were actually struck within the depot grounds, and the evidence shows that two others ran ahead of the train until they were run down and killed, several hundred yards west of the station grounds. The tracks of these animals were plainly to be seen, and they indicated that they were running at full speed, making jumps of about twelve feet. There is another very strong item of circumstantial evidence upon this disputed fact. At the

west end of the station ground there is a cattle-guard, to which the railroad right-of-way fences were attached in the usual way; that is, cross fences were built from the cattle-guard to the line of the right of way, and then turned at a right angle along the right of way. The cross-fence on the south side of the cattle-guard was composed of five barbed wires, double-twisted and fastened to posts by staples driven on the east side. These five wires were all broken, and four of them were strung along the ground to the west, and one to the east. It is incredible to suppose that the herd of horses, while quietly and peacefully grazing upon the station grounds, made a dash for this fence, and broke all of the wires, and went onto the right of way. Such a supposition is contrary to human experience, and, in our opinion, the jury was warranted in finding that the breaking of the fence occurred by reason of the excessive speed of the train, and stampede of the horses; that some of them, in their fright, broke through the fence, and others ran upon the track and were killed and injured. It is the duty of courts and juries to consider the reasonableness of the testimony of witnesses, and to weigh probabilities founded upon circumstances surrounding the transaction in dispute, and to apply the common experience of mankind, in determining questions of fact. Without further discussion, we have to say that we think the jury was warranted in finding as a fact that the train was run at a speed of more than eight miles per hour.

II. The jury found specially that three of the horses were struck by the defendant's train upon the depot grounds at Brown's Station. It is claimed that this finding is contrary to evidence. We cannot reproduce all of the evidence upon this question of fact without unduly extending this opinion. A careful examination of the record has led us to the conclusion that the evidence fully supports the finding, and we are content to dispose of the question in this general way.

III. We have said that two of the animals were killed some distance west of the station grounds; that

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2. RAILROADS:
unlawful
speed at sta-
tions : killing
of animals be-
yond the
grounds :
proximate
cause.

they were run from at or near the boundary of the station ground by the train, until overtaken and killed. As applicable to these two horses, the court instructed the jury as follows: "If, from a fair preponderance of the testimony introduced in this case, you find that the train was running at a greater rate of speed than eight miles an hour upon said depot grounds, you may next inquire whether or not injuries were inflicted upon said plaintiff's assignor thereby, and whether or not such injuries were the direct result of such negligent act. If you fail to find that such negligence upon the part of the defendant was the proximate cause of the injury, the plaintiff cannot recover. On the other hand, if the injury complained of was the direct result of such negligent acts, then plaintiff should recover (the other issues being found in his favor) such damages as have been established of a preponderance of the testimony. By 'direct result' is meant the first result or effect; and by 'proximate cause' is meant the nearest or next cause, as distinguished from a remote or predisposing cause. Therefore, in order that the defendant should be held liable in this case for any injury or damages sustained by plaintiff's assignor, in consequence of defendant's train running at a speed greater than eight miles an hour, it must further appear that such injury was the direct result of said alleged cause. But, in order to find that the injury was such direct result, it is not necessary to find that it was all inflicted within the limits of said depot grounds. If the injury, or some portion thereof, was inflicted just without said grounds, but so near thereto that it was and is reasonably and fairly attributable to the rate of speed above eight miles an hour the train was running upon the depot ground, as the proximate cause, then you may find the defendant liable for such animals, so killed or injured, without, but adjacent to, said grounds, as well as for those animals, if any, killed or injured upon the depot grounds by like negligence on the part of

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defendant. But such injuries, wheresoever inflicted, must be the direct result of the defendant's negligence, in order to entitle the plaintiff to recover; and, therefore, plaintiff cannot recover in this action for any animals killed or injured outside the depot grounds, which went outside before the coming of the train upon the depot grounds,—that is, the plaintiff cannot recover for animals killed or injured outside, unless the speed of the train, in excess of eight miles an hour, upon the depot grounds, frightened or forced or drove such animals, so killed or injured, beyond the boundary line of the depot ground. So, if you find from the testimony that said horses, or any of them, were struck, and killed or injured, at any point or place off the depot grounds, and that the defendant's said train was operated upon said depot grounds at a rate of speed in excess of eight miles an hour, then you may determine, from all the facts and circumstances of the case, whether said horses so struck, off the grounds, were upon the depot grounds at the time of the approach of said train, and its entrance upon said depot ground; and, if you find that they were there, it will be for you to further determine whether the killing and injury of said animals off said depot grounds was the direct result of the running of said train at a rate of speed in excess of eight miles an hour, upon said depot grounds; and, if you find that it was, then the negligence of defendant, and the injury resulting therefrom, are sufficiently shown. In other words, if you find that defendant's train was operated upon the depot grounds at a speed of more than eight miles an hour, and that said horses, being upon said depot grounds, were by the said speed of said train above eight miles an hour frightened or driven off said grounds upon another part of defendant's railway, and were there killed or injured by said train, then the right of the plaintiff to recover in this action would be the same as if said animals had been struck upon said depot grounds by said train, and killed or injured there. If you find from the evidence that

said horses, or any of them, had not been upon the depot grounds in question, or if, having been there, you find that prior to the coming of said train upon said depot grounds said animals had gone upon another portion of defendant's right of way, and were there killed and injured by said train, then plaintiff cannot recover for such animals, even if you find that said train was run across said depot grounds at a greater rate of speed than eight miles an hour, as such result would not be immediately linked with the defendant's negligence, or the injury directly attributable thereto."

It is urged that this instruction is erroneous, because under the rule announced by this court in the case of *Monahan v. Railway Co.*, 45 Iowa, 523, there can be no liability under the statute in any case, unless the stock are injured and killed upon the depot grounds. But that was a case where the injury occurred before the train entered upon the depot grounds. The defendant had the right to run its train at more than eight miles an hour until it reached the depot grounds. It is true, there is language in the opinion by which liability is stated to be limited to inquiries on the station ground. But here we have another illustration of the necessity of adhering to the very question before the court for determination. The instruction above cited is about as strong an argument as can be made in support of the idea that, where a law is violated, the violator should be held liable for the direct consequences of his unlawful act. If the language of the opinion in the cited case is to be held applicable to all cases, and limited to injuries actually inflicted upon animals on the station ground, a railroad company would not be liable if it should run through station grounds at forty miles an hour, and pick up an animal on the pilot, and carry it safely beyond the station grounds, and injure it by throwing it off at a place beyond the station. Such a construction of the statute would not be entertained by any court; and where, by excessive speed upon the station grounds, animals are stampeded, and run upon the

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track, either by breaking down fences or otherwise, and, without checking the speed, are run down and killed, the cause and effect are so closely connected as that it may fairly be said that the unlawful speed of the train was the direct and proximate cause of the injury, and we do not think the court invaded the province of the jury in so instructing them.

IV. Brown's Station is in Clinton county, in this state, and the evidence shows that the herd law is in

3. —: injury
to stock at
large: herd
law: duty of
stock-owner.

force in that county. The court instructed the jury, in effect, that if Powers, the owner of the horses, had them in a field enclosed with a fence reasonably sufficient to prevent them from escaping therefrom, he was not chargeable with contributory negligence in allowing the animals to escape. Counsel for appellee contend that, where the herd law is in force, the requirement that stock shall not be permitted to roam at large is absolute, and the mere fact that they were running at large precludes recovery. We do not think the position of counsel can be sustained. See *Pearson v. Railway Co.*, 45 Iowa, 497; *Doran v. Railway Co.*, 73 Iowa, 115; *Krebs v. Railway Co.*, 64 Iowa, 670; *Moriarty v. Railway Co.*, 64 Iowa, 696.

V. One other question demands brief consideration. The court struck out an answer of a witness to

4. —: —:
sufficiency of
fence: evi-
dence.

the effect that Powers, the owner of the horses, stated after the accident that the bars were not sufficient to keep the horses in. This answer was properly stricken out, because it was not responsive to the question, and because it was immaterial. There was no dispute that the bars were not sufficient to keep the horses in the field. The fact that they got out of the field was better evidence of that than the statement of any witness. The question in dispute was whether the fence and bars were reasonably sufficient to restrain stock. We discover no prejudicial error in the record, and are united in the opinion that the judgment should be

AFFIRMED.

In re ESTATE OF PETRANEK.**Wills: LEGATEES CHARGED WITH TRUSTS: REMOVAL BY COURT.**

Persons to whom money is bequeathed, but who are charged with the duty to use it for the benefit of others, are, considered in their relation to the testator and the will, legatees, but considered in their relation to the beneficiaries of the property, they are trustees, and, as such, upon their refusal to act, they may be removed by the court, and others appointed in their stead, to the end that the trust fail not; and the persons so appointed may demand and collect the money of the executor. (Compare *Perry v. Drury*, 56 Iowa, 60, and *Seda v. Huble*, 75 Iowa, 429.)

Appeal from Tama District Court.—HON. L. G. KINNE, Judge.

FILED, FEBRUARY 7, 1890.

PETITION in probate to compel payment of a legacy. In the last will and testament of Albert Petranek, deceased, it is provided among other things as follows: "I hereby give, devise and bequeath to Franz Sevcik and Fred. Huble, in trust for the benefit of the Catholic church on my farm in Tama county, Iowa, the sum of eight hundred dollars, and hereby direct that they or their successors shall invest said money safely for the benefit of said church, and that services be held in said church for my soul yearly." Vencel Ulch, Joseph Sebesta and Michael Silhonek, members and trustees of said church, filed their petition in the district court of Tama county against said Franz Sevcik and Fred. Huble, alleging that they declined to accept said money, and execute said trust, but desired to be excused therefrom, and were willing and anxious that the court should appoint the petitioners in their stead, to carry out said provisions of the will. Sevcik and Huble made default and, on October 4, 1887, a decree was entered "that the issues are found for the plaintiffs, and decree as prayed for in said petition. Vencel Ulch, Joseph Sebesta and

In re Est. of Petranek.

Michael Silhonek are appointed trustees of the fund, and Franz Sevcik and Fred. Huble removed thereby." On October 14, 1887, said Ulch, Sebesta and Silhonek filed their petition herein, asking an order upon the executor to pay them said legacy. J. J. Mosnat, executor, answers, denying that the district court had jurisdiction to remove said Sevcik and Huble, or to appoint these petitioners, and that, upon the petition of the heirs of the deceased to set aside said bequest as void, it was decided by the supreme court (75 Iowa, 429) that said Sevcik and Huble were legatees, and that the legal title to said money was in them. The matter was submitted to the court, and an order made upon the executor to pay over the legacy, eight hundred dollars, to the petitioners, within thirty days, and that the executor pay the costs, to which executor excepts, and from which order he appeals.

W. H. Stivers and J. J. Mosnat, for appellant.

Caldwell & Drahas and Struble & Stiger, for appellees.

GIVEN, J.—I. The only question presented in argument is whether the district court had authority to remove Huble and Sevcik, and appoint the petitioners. Appellant's contention is that Huble and Sevcik are not trustees, but legatees, and therefore the court had no authority to remove them, nor to designate others to occupy their place, under the will. In *Perry v. Drury*, 56 Iowa, 60, the will under notice contained bequests to the "trustees of funds and donations for the diocese of Iowa," and to the "bishop of the diocese of Iowa," in which it is expressed as being "in trust" for purposes named. In the bequest to the board of missions it is directed that "the said sum shall be invested by the board, and the interest accruing therefrom each year shall be applied by the said board in the support of missions in the diocese of Iowa." These trustees, board and bishop petitioned the court for an order on

the executors to pay the legacies. The prayer of the petition was denied, and an order entered requiring the plaintiffs to execute bonds as prescribed by Code, section 2350, which provides that "trustees appointed by will or by the court must qualify and give bonds the same as executors, and shall be subject to control or removal by the court in the same manner." From this order the plaintiffs appealed, claiming that they were not trustees, but legatees under the will; thus presenting the identical question that is now urged.

It will be seen, from what we have stated, that the bequests in that will and in this are identical, so far as it affects the relations of the persons named in the wills. In that case the court says: "Two classes of persons may take personal property under a will. The first class includes those who take property to hold for a determinate period, and at the expiration thereof it is to be transferred to the beneficiaries under the will. Such persons are in no sense legatees. They are merely trustees. The other class includes those to whom personal property is bequeathed, and who are charged with certain trust duties in respect thereto. They are, in fact, legatees charged with executing the benevolent or other purposes of the testator. Considered in their relations to the testator and the will, they are legatees. Regarded in their relations to the beneficiaries of the property which they take under the will, they are charged with trust duties. But they cannot be called trustees without words of qualification. They take the property as legatees, and in their relations to the will, and in the settlement of the estate, are known and designated as such. The plaintiffs belong to the second class above designated, and in the proceedings relating to the estate in the probate court are to be regarded and designated as 'legatees,' and not as 'trustees.' They do not, therefore, come within the provisions of Code, section 2350."

It cannot be questioned but that under said section 2350 the courts have power to remove trustees appointed

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in wills, for sufficient cause, and to appoint others to administer the trust; but, clearly, no such power can be exercised as to legatees. To do so would put the court in the place of the testator. *Seda v. Huble*, 75 Iowa, 429, was an action by the heirs of this testator to declare this bequest void upon the grounds, among others, that the church named had no legal existence, and that the church is prohibited from holding or taking any property. This court held that "the legal title to the money is in the persons named, coupled, however, with the trust;" and that it was immaterial whether the church is prohibited from holding property or not, because the money is not devised to the church, but to the parties named in the will. It follows from these cases that Frank Sevcik and Fred. Huble were legatees, charged with the trust of carrying out the purposes of the testator with respect to the money bequeathed. While they were legatees in such sense as to be exempt from giving bond, yet, in view of the power and duty of courts of equity to see that such trusts are fully and faithfully carried out, and that they do not fail for want of a trustee to execute them, our conclusion is that Sevcik and Huble were in such sense trustees that upon their refusing to act, or for other good cause, the court might properly appoint others to execute the trust. It is contended that, as there was a qualified and acting executor, and the estate unsettled, there was no necessity for appointing trustees. It is a sufficient answer to say that the executor had no power over this bequest beyond paying it to the persons authorized to receive it. The order of the district court is **AFFIRMED.**

THE STATE V. MELONEY

Liquor Nuisance: FINE: AMOUNT: DISCRETION OF COURT. Defendant plead guilty to an indictment for keeping a liquor nuisance, and was adjudged to pay a fine of one thousand dollars. He filed an affidavit to the effect that he believed the laws prohibiting the sales of liquors as he sold them to be unconstitutional, and that, as

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soon as the supreme court of the United States declared such laws to be constitutional, he closed his saloon, and was resolved never again to engage in the business in violation of law. There being nothing in the record as to defendant's antecedents, and nothing to show how often, if ever before, he had been indicted for similar offenses, *held* that this court could not say that the district court had abused its discretion, or that the fine was excessive.

Appeal from Wapello District Court.—HON. CHARLES D. LEGGETT, Judge.

FILED, FEBRUARY 7, 1890.

DEFENDANT entered a plea of guilty to an indictment which charged him with the crime of nuisance, committed by violating the law in regard to the sale of intoxicating liquors. He was adjudged to pay a fine of one thousand dollars, and to be imprisoned in the county jail in default of payment. From that judgment he appeals.

J. J. Smith, for appellant.

John Y. Stone, Attorney General, and *A. C. Steck*, County Attorney, for the State.

ROBINSON, J.—The indictment was presented and filed in the district court on the twenty-fifth day of November, 1887, and charged that the crime alleged was committed on that day, and at other times since the ninth day of September, 1887. The minutes of evidence attached to the indictment show a large number of sales of beer. An affidavit of defendant, which states, in effect, that in conducting his business he did so in good faith, believing that he had a right to do so, for the reason that he had erected the building described in the indictment, and furnished and fitted it up for the sale of beer, before chapters 8 and 143 of the Acts of the Twentieth General Assembly were enacted, and that he had kept the building closed since the constitutionality of liquor legislation had been

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affirmed by the supreme court of the United States, and was resolved not to engage in the business of selling liquors again in violation of law. The record shows no evidence but the minutes of testimony and the affidavit mentioned.

Appellant insists that the judgment was excessive, and asks that it be reduced. We know nothing of the antecedents of defendant, and but little of his business, excepting that it was illegal. His affidavit justifies the presumption that he had been engaged in that for some years, and the limitation of time fixed by the indictment suggests that it may not have been the first one found against him for violating the law in regard to the sale of intoxicating liquors. In many cases where fines are to be imposed for violations of law, the court, having a discretion as to the amount, may properly take cognizance of facts and circumstances which the record does not and cannot disclose, in fixing the amount of the fine; and, unless its discretion is abused, this court ought not to interfere. In this case there is nothing to show an abuse of discretion; and the judgment of the district court will, therefore, be **AFFIRMED.**

YOUNG V. THE BURLINGTON WIRE MATTRESS COMPANY.
1. Master and Servant: DEFECTIVE MACHINERY: PERSONAL INJURY.

Plaintiff, in the performance of his duty as defendant's employe, was required to place a belt upon a pulley, and in order to do so he used a ladder to climb to the pulley, and because the belt worked hard, as he tried to move it the ladder slipped and caught into another pulley, and threw plaintiff upon a belt running a tenon-machine, and he was finally thrown upon the knives of the tenon-machine and injured. *Held—*

- (1) That, since it was not the structure of the ladder that caused plaintiff to fall, but rather the strain upon it required by the work he was doing, he could not recover on account of alleged defects in the ladder.

79	415
89	147
79	415
100	211
79	415
107	79

- (2) That he could not recover on the ground that there should have been a "shifter" provided for placing the belt upon the pulley, because the pulley in question was a fixed one, and shifters are not used with fixed pulleys.
- (8) That defendant could not be charged with negligence in not having the knives of the tenon-machine covered, in the absence of a showing that it was customary, or even practicable, to cover such knives.
2. **Practice: ORAL MOTION TO DIRECT VERDICT.** A motion by defendant for a verdict upon plaintiff's evidence is a demurrer to the evidence, and need not be in writing, notwithstanding sections 2645, 2649 and 2911 of the Code, requiring motions in general to be in writing. (See *Foley v. Railway Co.*, 64 Iowa, 644.)
8. **Instructions: ORALLY DIRECTING VERDICT.** A direction to the jury to return a verdict for defendant upon plaintiff's evidence, upon motion to that effect, is not in the nature of an instruction, and is not, therefore, within the provision of section 2784 of the Code, requiring instructions to be in writing. (See *Milne v. Walker*, 59 Iowa, 186, and *Stone v. Railway Co.*, 47 Iowa, 82.)

Appeal from Des Moines District Court.—HON. CHAS. H. PHELPS, Judge.

FILED, FEBRUARY 7, 1890.

ACTION to recover for personal injuries sustained by plaintiff through defendant's negligence while engaged in operating machinery in defendant's manufactory. Upon the close of plaintiff's testimony the district court, upon the oral motion of defendant's counsel, directed a verdict for defendant. Plaintiff appeals.

Newman & Blake, for appellant.

C. L. Poor, for appellee.

BECK, J.—I. The evidence introduced by plaintiff shows that he was employed by defendant and engaged in running a saw propelled by steam in a room in defendant's manufactory where was other machinery, as a tenon-machine, also propelled by steam. He was required, in the discharge of his duty, to place a belt upon a

1. MASTER and servant: defective machinery: personal injury.

pulley which would move a circular saw. In order to do this, he ascended a ladder to the pulley. The belt "worked hard." In endeavoring to move it, the ladder slipped, caught into another pulley, and threw plaintiff upon a belt running the tenon-machine, and he was finally thrown upon the knives of the machine, and his hand was so injured that it was necessary to amputate the arm two and a half inches above the wrist. The ladder had no hooks or grapplings on the top end, nor spikes or projections on the bottom.

II. It does not appear that the structure of the ladder caused plaintiff to fall, but, rather, that the work he was doing required such a strain upon the ladder as to cause it to move, which threw defendant upon a belt. The fact that the accident resulted while plaintiff was using the ladder, and the form of its structure, do not authorize the conclusion that it was negligence in defendant to furnish the ladder for the plaintiff's use. There is no ground for the conclusion that, if the ladder had been differently constructed, the accident would not have happened.

III. The knives of the tenon-machine were not covered. It is doubtless true that if they had been covered the injury would not have resulted; at least, it would not have been of the extent suffered by plaintiff. But defendant is not required to use appliances so constructed that no injury can be inflicted by them under any circumstances. They must provide for their employes such appliances, so constructed, that they may be used, in the exercise of due care, with reasonable safety; and danger and injury must not result from the defects in or the defective construction of the appliances, considered in view of their use. We are impressed with the belief that had plaintiff been as watchful and as careful as he should have been the ladder would not have moved so as to throw him upon the tenon-machine, and that a ladder of the character which it is claimed this ladder should have possessed, if used with no greater care than plaintiff exercised

when he received the injury, would not have prevented the accident. In other words, the manner of the use of the ladder by plaintiff, rather than its faulty construction, caused the injury.

IV. It is said that there should have been a lever called a "shifter" used in pulling the belt on the pulley for plaintiff's use. But a "shifter" could not have been used in putting the belt on the pulley, for it was a fixed, or, as it is called in the abstract, a "tight," pulley, and was on the main shaft. "Shifters" are only used to move belts from fixed to "loose" pulleys, or *vice versa*; and, as we understand it, "loose" pulleys are not usually put upon a main shaft. They are commonly at the other end of the belting.

V. It is insisted that, if the knives of the tenon-machine had been covered, the accident would not have occurred. But it is not shown that this is usual, or even practicable, or that a cover could have been so constructed as to have prevented plaintiff's hand coming in contact with the knives when the machine was in use. If the machine was in use, or ready for use, it was plaintiff's duty to take notice of that fact, and to avoid all dangers arising from the knives being uncovered. We reach the conclusion that it does not affirmatively appear that the court below erred in directing a verdict to be rendered for defendant.

VI. It is insisted that the district court erred in entertaining an oral motion to direct a verdict for defendant. Counsel rely upon provisions of our statute requiring motions to be in writing. Code, secs. 2645, 2649, 2911. The motion was really a demurrer to evidence, by which defendant submitted his case upon the evidence offered by plaintiff, claiming that it established no ground of recovery in favor of plaintiff. 1 Archb. Pr. 196-209; Gould. Pl. 446. It is the uniform practice in this state to present such a motion or demurrer orally, and this court has sanctioned the practice. *Foley v. Railway Co.*, 64 Iowa, 644.

2. PRACTICE:
oral motion
to direct
verdict.

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VII. The direction to the jury to return a verdict for defendant was not in the nature of an instruction, and is therefore not within the provisions of Code, section 2784, requiring instructions to be in writing. *Milne v. Walker*, 59 Iowa, 186; *Stone v. Railway Co.*, 47 Iowa, 82. It is simply the announcement of the order made upon sustaining plaintiff's demurrer to the evidence. In our opinion, the judgment of the district court ought to be

AFFIRMED.

BECKER V. THE KEOKUK WATERWORKS.

1. **Cities and Towns: BREACH OF CONTRACT TO SUPPLY WATER: ACTION BY TAXPAYER.** The owner of city property which is destroyed by fire through a failure of a water company to supply water according to the terms of its contract with the city, cannot maintain an action for damages against the company, even though a special fund has been raised by the city by taxation to pay for a sufficient supply of water for use in case of fires, and the plaintiff has contributed to such fund. (Compare *Davis v. Waterworks Co.*, 54 Iowa, 59.)
2. **The Same: CONTRACT BY CITY FOR INDEMNITY OF PROPERTY-OWNER.** The powers conferred upon municipal corporations are to be strictly construed (*Clark v. City of Des Moines*, 19 Iowa, 212; *McPherson v. Foster*, 43 Iowa, 57); and the law, which authorizes cities to contract for the building and operation of waterworks by individuals or companies, confers no power to contract with such individual or company to indemnify a citizen and taxpayer for damages which he may sustain by reason of a failure to furnish water as provided in the contract, so as to enable the citizen to maintain an action therefor in his own name.

Appeal from Keokuk Superior Court.—HON. HENRY BANK, JR., Judge.

FILED, FEBRUARY 7, 1890.

ACTION to recover damages for loss of property by fire. A demurrer to the petition was sustained; and,

79	419
102	77
79	419
104	887
79	419
106	179
106	467
79	419
118	241
118	432
118	720
79	419
131	20

plaintiff refusing to further plead, judgment was rendered in favor of defendant for costs. Plaintiff appeals.

James H. Anderson, for appellant.

James C. Davis, for appellee.

ROBINSON, J.—In the year 1877, the city of Keokuk, by means of an ordinance, entered into an agreement with defendant for a supply of water. The ordinance specified the capacity of the waterworks which should be operated by defendant, and provided that it should at all times, day and night, be prepared to perform certain duties imposed by the ordinance, and to furnish the quantity of water specified. It provided that the city should pay fixed amounts for the use of a specified number of hydrants to be furnished by defendant for the purpose of extinguishing fires, and for other use, and that the amounts to be so paid should be raised by means of a special tax to be levied upon the taxable property within the limits of the city which would receive benefit and protection from the waterworks. Section 18 of the ordinance is as follows: “That in laying down the pipes and conduits necessary to supply the city with water it is hereby expressly provided that no authority is conferred by the council to interfere with the rights and privileges heretofore granted to the Keokuk Gaslight and Coke Company, and to railroads and other public corporations holding under the city; and it is expressly provided that said waterworks, in laying its mains and pipes, and in enjoying the privileges herein granted, shall not in any manner disturb or displace any of the permanent monuments of the said city at street crossings, and in other places. This grant to the water-works company being conferred with the expressed conditions that said company shall be liable for all injury to persons or property caused by the negligence, mismanagement or fault of itself or its employes, while engaged in the construction or operation of said works; and, should the city be sued

Becker v. The Keokuk Waterworks.

therefor, they shall be notified of such suit, and thereupon it shall be the duty of said company to defend or settle the same, and, should judgment go against the city, in such case they shall recover the amount, with costs, from the company, and the record of the judgment against the city shall be conclusive evidence in the cause to enable the city to recover in any suit therein against the company."

The plaintiff was a property-owner and taxpayer of the city of Keokuk at the time of the fire in controversy, and had paid special taxes levied upon his property pursuant to the terms of the ordinance, which were used, as therein provided, for the payment of defendant. While the contract with defendant was in force, property belonging to plaintiff situate within the limits of the city to be benefited and protected by the waterworks was destroyed by fire. The fire department of the city was at the fire in time to have extinguished it, but the supply of water failed through the fault of defendant, and in violation of its agreement; in consequence of which the property of plaintiff was burned. He seeks to recover its value of defendant.

I. The demurrer contains several grounds, only one of which, however, is so fully set out as to require examination. That is, in substance, that the petition fails to show a privity of contract between plaintiff and defendant. The chief question raised by the demurrer was considered in *Davis v. Waterworks Co.*, 54 Iowa, 59, and decided adversely to the claim now made by plaintiff. But he contends that this case differs from that in several material particulars. In this case a special fund was raised by the city to pay for a sufficient supply of water for use in case of fires, and to that fund plaintiff contributed. It is said that in making the contract, and in levying and collecting the taxes required by its provisions, the city acted as a mere agent. We do not think the fact that the city levies and collects a tax to be paid to defendant creates any privity of interest

1. CITIES and towns: breach of contract to supply water: action by taxpayer:

between defendant and the taxpayers. In making the contract, the city discharged one of the duties for which it was created; and in raising the required money it only provided the consideration due from it by virtue of the contract. It will hardly be claimed that defendant could proceed against a taxpayer, in the first instance, for any unpaid money due under the contract from the city.

II. It is said that section 18 of the ordinance expressly provides that defendant shall be liable for all injury to persons or property caused by the negligence or mismanagement of defendants or its employes, and that this action is authorized by section 2552 of the Code. It was decided in *Vanhorn v. City of Des Moines*, 63 Iowa, 448, that the city was not liable for the failure of the waterworks company to furnish the water required by its contract to extinguish fires, even though the city had taken a contract from the company to protect it from liability which might arise for malfeasance or neglect on the part of the company. It was further held that the city could not assume a liability for negligence where none was imposed by law, and that the contract of indemnity must be regarded as having reference to existing grounds of liability, and not as creating new ones. Much stress is placed by appellant upon that part of section 18 which provides "that said company shall be liable for all injury to persons or property caused by the negligence, mismanagement or fault of itself or its employes, while engaged in the construction or operation of said works." Municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available, and are essential to effectuate the purposes of the corporation; and those powers are strictly construed. *Clark v. City of Des Moines*, 19 Iowa, 212; *McPherson v. Foster*, 43 Iowa, 57. The law which authorizes cities to contract with individuals and companies for the building and operating of waterworks

2. The same contract by city for indemnity of property-owner.

Weitz v. The Ind. Dist. of Des Moines.

confers no powers upon a city to make a contract of indemnity for the individual benefit of a taxpayer, for a breach of which he could maintain an action in his own name. In view of the law applicable to such cases, the provision of section 18, relied upon by appellant, considered in connection with the entire ordinance, must be construed to refer to injuries for which the city would have been liable if caused by negligence, mismanagement or fault on its part. The judgment of the superior court is

AFFIRMED.

79	423
99	437
79	423
108	427

WEITZ V. THE INDEPENDENT DISTRICT OF DES MOINES.

1. **School Districts : CONTRACT FOR SCHOOL HOUSE : WHAT NECESSARY.** Under section 1723 of the Code, a school district cannot enter into a valid contract for the erection of a school house, except with the lowest responsible bidder upon his giving bonds for the faithful performance of the contract; and the mere acceptance of a bid by mistake, which is not the lowest responsible one, does not constitute a contract with the bidder.
2. **—— : —— : NOT CONSUMMATED.** Where plaintiff relied upon a resolution of defendant's directors accepting his bid for the erection of a school house, it was error to refuse defendant leave to plead and prove that it was the understanding of both parties that a written contract should be executed by the parties, and that the plaintiff should give bonds for the performance of such contract; for, if such was the understanding, there was no consummated contract.
3. **Appeal : RECORD : EVIDENCE.** On appeal to this court, only so much of the evidence offered and introduced should appear in the abstract as is necessary to determine the points to be reviewed.

Appeal from Polk District Court.—HON. MARCUS KAVANAGH, JR., Judge.

FILED, FEBRUARY 7, 1890.

ACTION to recover damages for the repudiation by defendant of a contract to build a school house, whereby,

Weitz v. The Ind. Dist. of Des Moines.

and by other acts, plaintiff was prevented from performing such contracts. A judgment was rendered upon a verdict for plaintiff. Defendant appeals.

St. John, Stevenson & Whisenand, for appellant.

Phillips & Harvison and *C. J. Goode*, for appellee.

BECK, J.—I. The plaintiff alleged that the defendant caused its secretary to publish a notice inviting sealed proposals for building a house to be occupied by a high school; that plaintiff responded to this invitation, and gave defendant a proposal for the work; and that defendant opened the bids received under the notice, and examined the same, and accepted plaintiff's bid, and caused plaintiff to be notified thereof. It is further alleged that plaintiff fully performed the contract which they alleged was entered into by the acceptance of this proposal, but that defendant repudiated the contract, and prevented plaintiff from performing it on his part. The allegations of the petition, except as to the publication of notice and the employment of architects, were denied in the answer. By an amendment thereto the defendant alleges that plaintiff and others submitted proposals for the work, and the directors of the defendant, believing that another bid lower than plaintiff's was not made by a responsible person, at a meeting of the directors voted to accept plaintiff's bid, which did not provide for the time for the completion of the building, nor the manner of making payments therefor, and it was understood by both that a written contract should be executed by the parties, and a bond, approved by the defendant's directors, should be executed by plaintiff, as security for the performance of the contract, and that after the adjournment of the meeting when the vote for accepting plaintiff's proposition was had, it was discovered by defendant's directors that plaintiff was not the lowest bidder, but that another bid, lower than plaintiff's, was made by a responsible bidder.

Upon motion of plaintiff the district court struck from the files this amendment to the answer, on the ground that it was immaterial. Evidence was introduced tending to show the acceptance of plaintiff's bid by a resolution of the defendant's directors, and the refusal of defendant to permit the plaintiff to do the work. It was also shown that another bidder had proposed to do the work for one thousand dollars less than plaintiff's offer. The defendant offered to prove that certain lower bidders were responsible, and that their bid was rejected because of the fact that they were not known to be responsible, and that, after the adjournment of the meeting at which the resolution was adopted accepting plaintiff's bid, the directors of defendant discovered that the lower bidders were responsible. This evidence was rejected, the court holding that the defendant became bound by the acceptance of the directors, which, with the proposal, constituted a contract between the parties. An instruction to this effect was given to the jury. Upon these rulings of the court certain questions arise, the determination of which will prove decisive of the case.

An instruction of the court in the following language plainly expresses the view of the district court as to the facts and the law of the case: "You are instructed, as a matter of law, that the plaintiff and defendant did enter into a contract for the erection of said building, whereby said plaintiff was to receive fifty-three thousand, five hundred dollars, and that the defendant was guilty of a breach of said contract, and plaintiff is entitled to damages therefor. The only question for you to determine is the amount of damages he is entitled to recover. The burden of proof is upon the plaintiff to prove such sum by a preponderance of the testimony." Upon these expressions of the view of the law and facts held by the court below, certain questions arise which are decisive of the case.

II. The statute requires that contracts of the character of the one in suit for the construction of a

Weitz v. The Ind. Dist. of Des Moines.

1. SCHOOL districts: contract for school house: what necessary.

school house "shall be let to the lowest responsible bidder, and bonds with sufficient sureties for the faithful performance of the contract shall be required." Code, sec. 1723. The power of the directors is limited and circumscribed by the statute. They can enter into no contract unless authorized to do so, when the terms of the contract and the manner of binding the district, and the things to be done in order to bind it, as prescribed by the statute, must be pursued. This position is based upon familiar legal principles. The statute confers upon the school directors the power to contract for the building of a school house with one who is the "lowest responsible bidder," and who shall furnish "bonds with sufficient sureties for the faithful performance of the contract." If plaintiff was not the lowest bidder, and did not furnish the bonds required, the statute conferred no power upon the directors of the defendant to contract with plaintiff. *Parr v. Village of Greenbush*, 72 N. Y. 463; *Dickinson v. Poughkeepsie*, 75 N. Y. 65; Dill. Mun. Corp. [1 Ed.] p. 388; [3 Ed.] secs. 466, 468. In defense to plaintiff's action the defendant was authorized to show that plaintiff was not in fact the "lowest bidder," and that the bond required by the statute had not been given. The acceptance of the bid of plaintiff by the resolution of the directors did not create a binding contract to do the work, for there was a want of compliance with the requirements of the statute, the observance of which is essential to confer authority upon the directors to enter into the contract. And for the same reason the acceptance of the proposal did not create an agreement to contract, for the reason that the contract, if made, would have been void. The law will not enforce an agreement to enter into a void contract. Counsel for plaintiff cite many cases relating to the creation of a contract by the acceptance of an offer or proposal and cognate matters, but none of these are in conflict with the position we have announced.

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III. The defendant ought to have been permitted to plead as a defense that it was the understanding of the parties that a written contract should be entered into. If that was an agreement, surely no contract existed for building the house, unless the written instrument had been executed. It may be that the acceptance of the bid, had there been no statute requiring a contract to be made with the lowest responsible bidder, would have raised an agreement to enter into a contract. But this action is not upon such an agreement; it is on the contract to build the house, which, if there was an agreement that it should be reduced to writing, was in fact never entered into. See *Commissioners v. Brown*, 32 N. J. Law, 504; *Morrill v. Mining Co.*, 10 Nev. 125; *Fredericks v. Fasnacht*, 30 La. Ann. 117; *Avendano v. Arthur*, 30 La. Ann. 316; *Congdon v. Darcy*, 46 Vt. 478; *Eads v. City of Carondelet*, 42 Mo. 113; *Paige v. Woolen Co.*, 27 Vt. 485. These constructions lead us to the conclusion that the district court erred in striking the amended answer, in excluding the evidence above referred to, and in giving the instruction quoted above.

IV. Objection is made to the record on the ground that it is not shown that we have before us all the evidence offered as well as the evidence introduced. The questions just disposed of do not, for their determination, demand that all the evidence offered and received should be before us. All that is required is that the record should show the applicability of the evidence offered to the issue. The instruction given announces a rule of law which plaintiff, in maintaining its correctness, cannot deny is applicable to the facts of the case.

The motion to strike the amended answer, being in the nature of a demurrer, may be determined without considering the evidence upon the pleading alone. For the errors pointed out, the judgment of the district court is

REVERSED.

2. —: —:
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2. APPEAL: re-
cord: evi-
dence.

79	428
84	42
79	428
99	286
79	428
131	506

NORDBY V. CLOUGH *et al.*

Chattel Mortgage: APPLICATION OF PROCEEDS: CONDITIONAL ACCEPTANCE OF ORDER. Defendants had a chattel mortgage on cattle which had been sold, and the proceeds were in bank to the credit of the mortgagor, but were held by the bank upon request of defendants, and also upon request of the purchasers of the cattle, who directed the bank to pay out the money in such manner as would protect them against the mortgage. The mortgagor gave plaintiff an order on defendants for a sum of money "for feeding twenty head of steers * * * upon which you now have a chattel mortgage, and charge the same to my account." Defendants accepted the order "so far as we have money in our hands after our claims or notes are satisfied in full out of the proceeds" of the mortgaged cattle. S., another creditor of the mortgagor, commenced suit and garnished the bank, but the suit was dismissed upon an understanding between him, the mortgagor and defendants that his claim should be paid after defendants' mortgage. The payment of the mortgage and the claim of S. left only enough of the proceeds to pay a part of plaintiff's order, and in an action by him against defendants on the acceptance, *held*—

- (1) That the mortgage on the cattle did not give defendants a lien upon the proceeds. (See *Waters v. Bank*, 65 Iowa, 234.)
- (2) That, in view of the fact that the proceeds were not in defendants' control, their acceptance of the order must be regarded only as an agreement to apply the excess of the fund, so far as they could legally control it, in payment of the order. (See *County of Des Moines v. Hinkley*, 62 Iowa, 637.)
- (3) That, as against S.'s attachment, the defendants could not control the fund for the payment of their mortgage.
- (4) That defendants' agreement that S. should be paid next after satisfying the mortgage did not diminish the amount that plaintiff would have been entitled to upon his order, and did not make defendants liable to him for the unpaid balance thereof.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, FEBRUARY 7, 1890.

L. AND C. ANDREWS were the owners of five carloads of cattle on which the defendant firm held a mortgage

Nordby v. Clough.

to secure an indebtedness due from Andrews to it. The Andrews were also indebted to the plaintiff in the sum of \$283.92 for feeding said cattle. In February, 1887, the cattle were shipped to Chicago, and sold to Hunter, Evans & Co., and the proceeds of the sale of one carload, \$850.62, was by Hunter, Evans & Co. placed in the bank at Dunlap, Iowa, to the credit of Andrews. On the seventeenth day of February, the defendants sent a telegram to Hunter, Evans & Co. as follows:

“SLOAN, IOWA, 81:20 Pd., 2—17, 1887.

“*To Hunter, E. & Co.:* We hold mortgage on load Charles Andrews' cattle. You must not pay over any of the proceeds to them. If you have, stop payment. Answer at once.

“CLOUGH & COE.”

On the eighteenth they sent to the bank at Dunlap the following telegram:

“SLOAN, IOWA, Feb. 18, 1887.

“*To Dunlap Bank:* You must not pay L. and Charles Andrews the remittance from Hunter, Evans & Co. until Andrews settles with us. We hold mortgage against the cattle. Answer.

“CLOUGH & COE.”

The bank at Dunlap also received a communication from Hunter, Evans & Co., directing it to consult one Childs, and make such settlement of the matter as would protect them. On the first day of March, 1887, Andrews made to plaintiff the following order:

“*Messrs. Clough & Coe, Sloan, Iowa:*

“Please pay to M. H. Nordby or order the sum of two hundred and eighty-three and ninety-two-hundredths dollars (\$283.92), being the amount of money due said M. H. Nordby for feeding twenty head of steers purchased by me from you, and upon which steers you now have a chattel mortgage, and charge the said \$283.92 to my account.

“March 1, 1887, ONAWA, IOWA.

“L. ANDREWS.”

On the back of the order is an acceptance as follows:

Nordby v. Clough.

“SLOAN, March 2, 1887.

“We accept the within order so far as we have money in our hands after our claims or notes are satisfied in full out of the proceeds of the sale of five cars of cattle in our chattel mortgage against L. and Chas. Andrews.

“CLOUGH & COE.”

After the money was in the bank at Dunlap, one Smith, who was also a creditor of Andrews for feeding the cattle, in the sum of \$432.10, commenced suit against Andrews, and garnished the bank. This was before the defendants' mortgage was paid. Smith afterwards dismissed his suit, in pursuance of an understanding with Andrews and defendants that his claim should be paid after defendants' mortgage. The payments on defendants' mortgage, the claim of Smith and \$155.30 on plaintiff's order exhausted the fund in the bank; and this suit is to recover on the defendants' acceptance of the order for the unpaid balance. The district court gave judgment for the defendants, and the plaintiff appeals.

McMillan & Kindall, for appellant.

J. H. & C. M. Swan, for appellees.

GRANGER, J.—The cause was tried to the court without the intervention of a jury, and there appears to be no dispute as to the facts. The acceptance on which plaintiff relies for his recovery is recognized by both parties as a conditional one, and we do not think it necessary to refer to authorities cited as to the effect of an unconditional acceptance. We think the acceptance should be construed by the court standing as near as may be in the situation of the parties when it was made, and so as to conform it to their understanding. The literal language of the acceptance would only require them to apply money in their “hands” after the payment of their claim. But such a construction would not meet the intent of the parties, even if such an

Nordby v. Clough.

expression was held to mean in their immediate custody. In ascertaining the understanding of the parties, it is proper to consider the facts as to, and the situation of, the fund, as known to the parties at the time of acceptance; for the payment is to be made from a particular fund, and the acceptance is conditional. *County of Des Moines v. Hinkley*, 62 Iowa, 637. The source whence the fund came, and its location, was at the time known to the parties. We think the parties then understood, and that such is the legal import of the acceptance, that the defendants were to apply the excess of the fund in payment of the order in so far as they could legally direct or control it; that it was not the understanding that they assumed a personal obligation, unless such obligation should arise from their wrongful act. There was sufficient of the fund after the payment of defendants' mortgage to pay plaintiff, and the reason plaintiff was not paid was because it was used to pay Smith. There is testimony tending to show, and there appears to be no conflict (but, if there is, the fact must be regarded as established on appeal in a law case, if necessary to sustain the judgment below), that the suit of Smith against Andrews, in which the bank was garnished, was dismissed with the understanding that Smith should be paid from the fund next after defendants' mortgage. It is true plaintiff was not a party to this understanding; but let us inquire if he was prejudiced by this course, or, in other words, if the fund would have been available for the payment of his claim if the agreement to withdraw the suit had not been made. Plaintiff's only claim to the fund was by virtue of the acceptance on which he sues. Defendants had no legal control over the fund in the Dunlap Bank. Their mortgage lien on the cattle did not extend to the proceeds of the sale. *Waters v. Bank*, 65 Iowa, 234. As against an attaching creditor, they could not control the fund for the payment of their own mortgage. It must then be regarded as a fact in the case that Smith, by virtue of his attachment lien, stood as a preferred creditor, and, without the consent of defendants, could have

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reduced the fund to the extent of his claim; and thus, after the payment of defendants' mortgage, there would have been no more for plaintiff than he has received. The mere fact, then, that defendants and Andrews agreed with Smith to withdraw his suit, and receive his money, did not prejudice the plaintiff. We are led to believe that appellant's contention is based largely on the belief that the defendant firm, by virtue of its chattel mortgage, had the right to control the funds in the bank, because, in argument, when speaking of the direction of defendant to the bank to remit what was due it and hold the balance till Smith and Nordby should settle the matter of feed between them, it is said: "This direction shows unmistakably that they were controlling this fund as they had a right to do, under their chattel mortgage, as against all persons except Andrews' equity in the fund." A reference to the case of *Waters v. Bank, supra*, will show that the defendant, by virtue of its chattel mortgage, did not have such right, but, on the contrary, until the lien of Smith attached, Andrews alone had the right of control. It must be that the court below found that Andrews had never transferred this right of control to the defendant; and from the record there seems to be no purpose to give defendant any greater right than it possessed by virtue of its mortgage. As to such right, there may have been a mistaken view; but that fact would not change the right of Smith to secure his claim, nor would it impose additional burdens on the defendant because of its conditional acceptance. The judgment appears to be right, and it is

AFFIRMED.

THE STATE V. CADWELL *et al.*

- 1 **Fraudulent Banking:** INDICTMENT AND PROOF: AGENCY. An indictment charging defendants with fraudulent banking, in that they received a certain deposit at a stated time and place, when they were insolvent, is sustained by proof that their cashier received the deposit as their agent; the rule applying that what one does by his agent he does himself.

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2. ——— : “DEPOSIT” DEFINED. Such indictment is sustained by proof of the receipt of money upon a certificate of deposit,—the transaction in such case being as truly a “deposit,” within the meaning of the statute, as is an ordinary call deposit.
3. ——— : INSOLVENCY : EVIDENCE. As tending in some degree to prove the insolvency of the bank at the time of accepting the deposit, it was competent to introduce an assignment for the benefit of creditors, made by defendants five months after the date of the deposit.
4. The Same : OPINIONS OF EXPERT ACCOUNTANTS. In such case, an expert accountant, who has examined the books of the bank with reference to its solvency at different times, may, in connection with the *data* upon which his opinion is founded, testify as to his opinion concerning the solvency or insolvency of the bank.
5. The Same : VALUE OF DEFENDANTS’ HOMESTEADS. In such case, where the defendants had made an assignment which did not include their homesteads, *held* that evidence of the value of such homesteads was not admissible to show that they were solvent.
6. The Same : OPINIONS OF EXPERT ACCOUNTANTS : BEST EVIDENCE. While the books of the bank in such a case are the best evidence of what they show as to the solvency of the bank, yet it is proper to aid the jury in determining what they show, by accompanying them with the opinions of expert witnesses who have examined them with reference to the point in question.
7. The Same : TWO BANKS OWNED BY INDICTED FIRM. Where defendants were indicted as a firm, and the firm owned two banks in the same county, in one of which the deposit was received, it was competent to inquire into the solvency of both banks for the purpose of ascertaining whether the firm was insolvent at the time of receiving the deposit.
8. Fraudulent Banking : INSTRUCTION AS TO FORM OF CRIME NOT CHARGED. Upon an indictment of the owners of a bank for receiving a deposit when they were insolvent, the court, in its instructions, quoted the statute under which the indictment was found, including language which made it a crime to “be accessory, or permit, or connive at, the receiving or accepting on deposit,” etc. *Held* that this was not submitting to the jury an issue as to a form of the crime not charged in the indictment, since the whole charge made it clear that defendants were accused only of themselves receiving the deposit in question.
9. ——— : INSTRUCTIONS AS TO KNOWLEDGE. In such case, where the deposit was in fact received by defendants’ cashier, it was sufficient, on the point of defendants’ knowledge, to instruct that the deposit must have been received on their authority, and that they must have received it knowing of their insolvency.

10. ———: INSOLVENCY: WHAT CONSTITUTES. A firm engaged in banking is insolvent, within the meaning of chapter 153, Laws of 1880, making it a crime for bankers to receive deposits knowing of their insolvency, when it is unable to meet its liabilities as they become due in the ordinary course of business; and bankers who receive deposits, knowing themselves to be thus insolvent, cannot escape the penalty of the law on the ground that they believe that, with time and indulgence, they can settle all demands. (See opinion for a discussion of the term "insolvency" upon the authorities.)

Appeal from Harrison District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, FEBRUARY 7, 1890.

INDICTMENT for fraudulent banking. From a judgment against defendants, they appeal.

L. R. Bolter & Sons and *J. W. Barnhart*, for appellants.

John Y. Stone, Attorney General, for the State.

GRANGER, J.—The defendants are indicted under chapter 153 of the Laws of the Eighteenth General Assembly, which provides "that no bank, banking house, exchange broker, deposit office, or firm, company, corporation or party engaged in banking, broker, exchange or deposit business shall accept or receive on deposit * * * any moneys, bank bills or notes, or United States treasury notes or currency, or other notes, bills or drafts circulating as money or currency, when such bank, or banking house, exchange broker or deposit office, firm or party is insolvent," and that "if any such bank, banking house, exchange broker or deposit office, firm, company, corporation or party, shall receive, or accept on deposit, any such deposits, as aforesaid, when insolvent, any officer, director, cashier, manager, member, party or managing party thereof, knowing of such insolvency, who shall knowingly receive or accept * * * any such deposits as aforesaid, shall be guilty of a felony, and upon conviction shall be punished" as therein provided. The

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indictment in this case was returned about November 10, 1888. For some years prior thereto, the defendants had owned and managed two banks,—one known as “Cadwell’s Bank,” at Logan, and the other known as “Boyer Valley Bank,” at Woodbine,—both in Harrison county. The indictment charges that on the seventeenth day of May, 1888, the defendants, as such bankers, were insolvent, and on that day they accepted and received from Mary E. Oliver, on deposit, one hundred and ten dollars. On the ninth day of October, 1888, the defendants, under the provisions of the statute, made a general assignment for the benefit of their creditors, and Stephen King was made their assignee. The record presents a number of questions which we will consider in their order.

I. At the time the deposit in question was received, one John X. Aleck was cashier of defendants’ bank at Logan, and issued the certificate; and at the time neither of the defendants was present. The certificate, against the objection of the defendants, was admitted in evidence, and the ruling is made a ground of complaint here. A specific ground of complaint in argument is that the defendants were indicted for receiving the deposit, and it is not competent to show on the trial that the money was received by another than the defendants personally. We think no such rule has ever been held by a court of last resort. On the contrary, a general and well-recognized rule is that, if a person does the act constituting the offense, through the agency of another, the act is his, and it is unnecessary to aver the agency in the indictment. It may be charged directly as his act, and proof that he did the act through the agency of another will sustain a conviction. Whart. Crim. Ev. [9 Ed.] secs. 102, 112; Whart. Crim. Law [9 Ed.] sec. 522; *State v. Neal*, 7 Fost. (N. H.) 131; *Commonwealth v. Nichols*, 10 Metc. 259; *Commonwealth v. Bagley*, 7 Pick. 279; *Stoughton v. State*, 2 Ohio St. 562; *Brister v. State*, 26

1. FRAUDU-
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Ala. 107. It is further said, in this connection, that the defendants are not charged with permitting or conniving at the receiving of the deposit, but with receiving it themselves, and that, under the averments of the indictment, the proofs as to Aleck's receiving the money are not admissible. The rule above announced is conclusive of this question. The defendants are indicted as a firm of bankers, and as such they are charged with receiving the money; and it is entirely immaterial whether they received it in person, or through their cashier. In law, if they permitted him to do it for them, they did it themselves.

Our attention is directed to Code, section 4298, to the effect that the indictment must be direct and certain as to the particular circumstances of the offense charged, when necessary to constitute a complete offense. The indictment in this case charges that the defendants, as such bankers, did, at a certain time and place, being then insolvent, receive the deposit in question. That is certainly a statement of the facts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. Such alone is the requirement of the law. Code, sec. 4296. Under such averments, the state may prove that they received the deposits through the cashier of their bank.

Another point urged as against the admission of the certificate of deposit in evidence is that on its face it is evidence of money loaned, instead of
2. —: "depos-
it" defined. a deposit, that the indictment charges the offense as receiving, and the law only makes it an offense to receive money on deposit. The certificate is as follows:

"§110. CADWELL'S BANK, LOGAN, IA., May 17, 1888.

"This certifies that Mrs. Mary E. Oliver has deposited in this bank one hundred and ten dollars, payable to the order of self, in current funds, on the return of this certificate properly indorsed. No. 2142.

"JOHN X. ALECK, Cashier."

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It is true the transaction is, in a certain sense, a loan of money, but not in a sense to distinguish it from the deposit contemplated in the law. In banking circles, deposits are often qualified or distinguished as "time" and "call" deposits. The former is for a specified time, and the latter is subject to call at the pleasure of the depositor. In fixing the character of the transaction, we look to the intent of the act, making the receipt of deposits by an insolvent bank a crime. In some measure, we judge of that intent by looking to the evil to be remedied by it. It is a matter of common observation that deposits are made, in banks, upon an entirely different reliance as to security than in the investment of money as a "loan," as the term is generally understood. Banks, in receiving deposits, offer no security, nor is security expected. The money is thus placed in a bank because of a confidence in its solvency and ability to repay, because of the fact that it is a bank; and this confidence continues, even in the face of the fact that it is so often misplaced. In the case of ordinary loans, the question of the solvency of the borrower, and the safety of the investment, is made a matter of prior investigation; and in many sections of the country a pledge of property as security is generally required. In making these deposits with banks without security, people make no distinctions in the character of the deposits; that is, whether they are "time" or "call" deposits. They are made with the same confidence in the solvency of the bank, and upon like terms as to security. The repeated instances in which this confidence has been betrayed, and depositors subjected to loss, led to the legislation referred to. Under the present law, no insolvent bank has the right to receive money on deposit. It is fair to presume that the legislature used the term "deposit" as it is ordinarily used in banking and commercial circles, and we see no reason for thinking the law designed a protection for the people against loss by one class of deposits, and not the other. The certificate designates the transaction

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as a "deposit," and we think it clearly within the purview of the legislative purpose.

II. The deed of assignment was admitted in evidence, of which complaint is made. A claim especially urged in this respect is as to the difference in time between the deposit, May 17, 1888, and the assignment, October 7, 1888. In this there was no error. Such assignments are made because of solvency, actual or contemplated. The deed of assignment tended to prove insolvency at the time it was made, which, it is true, was nearly five months after the deposit; but, if it alone, or with other evidence, established the fact of insolvency at that time, that fact might be an aid in determining the true condition of the bank in May, by showing what changes had taken place in the property affairs of the firm in the meantime. To plainly illustrate, let it appear from other evidence that no change had taken place. Then, of course, there was insolvency in May. If changes, then what were they? And the fact is a question for the jury. It is true, as said in argument, that one may be free from debt in May, and hopelessly involved in October; but the October condition of the bank is not allowed to define or control that of May. It is only a link in the chain that establishes the ultimate fact.

III. W. H. Wood was a witness for the state. He was an accountant, and of some months' experience in a bank. He stated that he had examined the books of the two banks with reference to discovering assets that might not have been reported, and also as to the solvency or insolvency of the banks at different times. He was then asked: "Do you know now what the condition of Cadwell's and the Boyer Valley Bank was, as to the assets of those banks being sufficient to pay the indebtedness of said banks, on the seventeenth of May, 1888, confining yourself to the condition of the two banks financially?" To this there was an objection on grounds that it was

8. —: insol-
vency:
evidence.

4. THE same:
opinions of
expert ac-
countants.

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incompetent, not the best evidence, and called for a conclusion. The question, however, was not answered, more than to say he could not state the condition at the time, but is important to understand the next question and the ruling. The question then was: "State, if you know, what the condition of these banks was on the first of January, 1888, as to being solvent or insolvent." The same objection to this question was overruled, and the witness answered: "I think I do." He then, under objections, stated that he thought them insolvent, and made the same statement as to their condition in October, 1888, at the time of the assignment. The witness was then permitted to refresh his memory from the books, and stated that, in his opinion, the banks were insolvent on the seventeenth of May, 1888, and that, in his opinion, from his examination of the books, the banks had been insolvent every year since, and including, 1883. He then stated that from the books it appeared the liabilities of each of the banks, for each year from 1883, inclusive, to October 9, 1888, were in excess of the assets. The amount of the excess for each year is then stated. The examination of this witness was quite extended, and involved the results of his calculations from the book-entries as to bills receivable and bills payable, the real estate of the banks, the capital stock, and other items necessary to be known to determine the fact of solvency.

Enough of the testimony has been stated to understand the purport of our ruling. The testimony was under objection; and it is particularly urged that he should not have been allowed to state his conclusions as to the solvency of the defendants. The witness did not give his opinion, independent of *data* as to their solvency, but he merely gave the result of his calculations. It is true that in making these estimates, by which the final result was reached, the witness used estimates, made by himself and others, including the assignee, of the value of the assets; but the result of the estimates appears in the accounting, and his

conclusions as to solvency are based on the figures presented. Other witnesses also examined the books, and made special investigation as to the *status* of the firm, and, with their statements somewhat in detail as to their means of knowledge, gave it as their opinion that the firm was insolvent. Appellants claim, under the authority of *Hall v. Ballou*, 58 Iowa, 585, that it was improper for the witnesses to give their opinion as to the solvency of the defendants. We do not think the case authority for their claim. In that case a witness said he only knew of the solvency of the party from "general reputation." The question then was: "State whether or not he is solvent or insolvent." The question was held improper, and rightly so, on authority. General reputation is not admissible to prove insolvency. The court said: "The personal opinion of the witnesses was not admissible for any purpose," but the statement of the court was based on the showing made. The witness had no information on which to base an opinion. In this case the facts are very different. The witnesses had made careful investigation as to what property was in existence, its value, and the liabilities of the defendants. They knew of the character of the assets, as to being convertible within a reasonable time, and had opportunities for knowing whether the facts as to solvency, under the rule given by the court, existed. We think there was certainly no error in the admission of the testimony.

One J. V. Mallory, who had been a cashier in the Boyer Valley bank for some years, and knew of its condition to the fall of 1887, and who had had conversation with one of the defendants tending to show to some extent the condition of the firm, was asked if he knew the condition of the firm as to solvency in the spring of 1886. There was an objection to the question, which was overruled. The witness did not answer the question, but stated that he should not think they were solvent. It was certainly proper to inquire if the witness knew their condition. The answer was not

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responsive, and no effort was made to rid the record of the answer given; and we do not think appellants can now complain.

Two witnesses were offered by the defendants to show the value of their respective homesteads, as bearing on the fact of solvency, whom the court rejected; and the appellants urge that they had the right to include the value of their homesteads in the aggregate of their assets. In making the assignment for the benefit of their creditors, the defendants reserved to their own use their homesteads, and hence they were in no sense assets to be offset against the liabilities, under a rule of solvency hereafter announced in this opinion, and there was no error in the ruling.

A question is made as to the right of the witness to state the results of his examination of the books, on the ground that the books themselves are the best evidence of their contents. This method is very common in practice, and, we think, correct. While the books were in evidence, the task of tracing them through years of entries, to determine so intricate a question, if possible for the jury, was not practicable; and in such a case, while the books are the best evidence as to their contents, the jury may be aided by other evidence to understand them; the books remaining to verify the truth of the statements made. If, in a trial, an instrument written in a foreign language is put in evidence, while the paper itself is the best evidence of its contents, expert testimony is competent to translate and bring it to the understanding of the jury. The rule is no less available in cases where juries require assistance to understand long and difficult accountings. Take a case where books or records contain the best evidence of scientific calculations or measurements. A high degree of mathematical skill and experience is necessary to understand them. The books are the evidence of the fact to be established, but expert testimony is competent to aid the court to fairly comprehend and weigh it.

5. THE same:
value of
defendants'
homesteads.

6. THE same:
opinions
of expert
accountants:
best evidence.

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IV. The court permitted an investigation into the resources and liabilities of the bank designated as

7. THE same :
two banks
owned by
indicted firm.

“Cadwell’s Bank,” and the one known as the “Boyer Valley Bank,” and appellant urges that in so doing there was error; that the deposit was in the bank known as “Cadwell’s Bank,” and that the Boyer Valley Bank had no relation to, or connection with, the transaction; and that to allow its affairs to be investigated was certainly error. To a proper understanding of the question, we look to the statute defining the offense, and to the indictment. The act provides that if any “bank, banking house, exchange broker, * * * firm, company, corporation or party shall receive or accept deposits * * * when insolvent,” etc. The indictment charges that P. Cadwell and W. C. Cadwell, “on or about the seventeenth of May, 1888, * * * being engaged in the banking business under the firm name and style of ‘Cadwell’s Bank,’ and then and there as such bankers, being insolvent, * * * did accept and receive a deposit,” etc. We think a fair interpretation of the indictment is that the defendants are indicted as members of a firm engaged in the banking business, and that the firm, being insolvent, received the deposit. The act, in defining who may commit the offense, specifies a firm, among others. As we view it, then, it was necessary to show that the banking firm was insolvent. This same firm owned and controlled two banks in the county of Harrison; and while, in some respects, the banks were distinguishable as in name, and perhaps in business management, the assets of the two banks were the assets of the one firm, and the liabilities of the two banks were the liabilities of the one firm. Being but a copartnership, the entire assets of the firm constituted its resources for the payment of its debts, and the entire liabilities of the firm constituted the charges or claims against such resources. Hence we do not see how the insolvency of the firm could be shown except by a marshaling of the entire assets and liabilities. If it were

true that the Cadwell Bank was but a trifle below solvency, considered with reference to its own resources and liabilities, and the Boyer Valley Bank largely above, the one barely insolvent,—and the other rich in available resources, the firm owning the two could not be said to be insolvent, nor could the depositor in the Cadwell Bank be in the situation contemplated by the act in making the receipt of the deposit a crime. In such a case, the firm on which the depositor relied, and which would be legally responsible to him, would be solvent, and the condition contemplated by the law to constitute the offense would not exist. We do not think it was error to permit an inquiry as to the condition of the two banks.

V. Defendants presented to the court a series of instructions, sixteen in number, designed to cover the entire law of the case, a part of which are substantially embodied in the charge of the court. Defendants, however, complain that in many respects the court fell into error. Several of the grounds of complaint as to the instructions involve the principles discussed as to the admission of the testimony, and it will be unnecessary to consider them again. To illustrate: The instructions asked made it necessary, in order to convict, for the jury to find that the deposit was received personally by the defendants; that it would not be sufficient to show that it was received by their cashier upon their authority. The court's instructions gave the law in accord with our view as hereinbefore expressed. With this statement, it will be unnecessary to refer to quite a number of points made in argument.

In the third paragraph of the court's charge it incorporates the substance of the act quoted at the commencement of this opinion. Appellants, in argument, italicise the words, "or be accessory, or permit, or connive at, the receiving or accepting on deposit, therein or thereby," and urge that such words have no application to the case. If we agree to the criticism,

8. FRAUDULENT
banking: in-
struction as
to form of
crime not
charged.

we must then ask, of what avail is it? The court, in its instructions, tells the jury of what the defendants are indicted, and what facts must be proved to justify a conviction. There are other words in the law as quoted, not essential to this case, but entirely harmless, as we think these are. We incline to the view that this point is urged because of the position taken, that the receipt of the deposit by the cashier would not warrant a conviction of defendants, and that, as they were indicted for receiving the deposit, they cannot be convicted for permitting or conniving at the deposit. It is manifestly clear that the court never designed to submit a question on that particular phase of the law, nor could the jury, in reason, have thought so. The court instructed the jury as to the deposit being received or accepted by the defendants, and said that it was not necessary that the evidence should show that the defendants, or either of them, in person received or accepted the deposit; that it was enough if it was received by their officer or agent "under their authority." There is quite an extended citation of authorities to the effect that it is error to instruct the jury as to an issue not involved in the case. The court presented no such issue to the jury, and hence the authorities are of no avail.

VI. Complaint is made that the court nowhere instructed the jury that the deposit must have been knowingly received or accepted. If we agree that a correct rendering of the law is that the party indicted, to justify conviction, must knowingly receive or accept the deposit, and with knowledge of the insolvency of the bank, we then think the instructions sufficiently broad. As to knowingly receiving and accepting the deposit, if they received it themselves, they must have known it; but this they did not do. It was done by their cashier; and the court, in that respect, told the jury that in such a case it must have been on their authority. If it was received on their authority, they must have known it; they must have authorized it. As to the knowledge of the insolvency of the bank, the jury is expressly told, in the

9. — : instructions as to knowledge.

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eighth instruction, that they must have received the deposit, knowing the firm to be insolvent. We see no ground for just complaint in this respect.

VII. Upon the question of what constitutes solvency or insolvency in the application of a criminal statute, there is a wide difference of opinion, and the court's instruction on that branch of the case is vigorously assailed. The

10. —: insol-
vency: what
constitutes.

newness and the importance of the question leads us to set out the instruction, and it is as follows: "Par. 4. This statute was enacted to protect depositors in banks and banking institutions, and to punish fraudulent banking. The word 'insolvent,' in its ordinary sense, as applied to an individual, means inability to pay all just claims or debts. So, also, a party who is unable to pay his debts, according to the usages of the trade, or proceed in business without a general arrangement with his creditors, or by indulgence by way of extension of time of payment, is insolvent under our insolvent laws. The word 'insolvent,' as used in this statute and in the indictment herein, and applied to a bank, or firm, or a company engaged in the business of banking, means inability to meet liabilities in the usual course of business; and, if the assets of a banking firm are insufficient in value to pay the debts of such firm, then such firm is insolvent. A bank or banking firm is solvent, within the meaning of this statute, when it possesses assets of sufficient value to pay, within a reasonable time, all its liabilities through its own agencies, and is insolvent when it does not possess assets of such value. One of the questions for you to determine from the evidence is whether the banking firm composed of the defendants P. Cadwell and W. C. Cadwell was insolvent about May 17, 1888. The funds of a bank are supposed to be ready at hand to meet the wants of its patrons, and of the commercial, trading and manufacturing communities in which they are located. So, in determining this question, you will consider all the evidence before you relating thereto,

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the amount and character of the assets of the defendants' firm, both under the name 'Cadwell's Bank' and 'Boyer Valley Bank,' and the reasonable cash value thereof; the uncertainty, if any has been shown, of being able to realize on such assets, in a reasonable time, a sufficient amount to meet liabilities of the firm; the availability, or want of availability, of such assets, as carrying of debts upon which little or nothing can be realized except after long delays; investments in real estate which may take time to turn into current funds; any and all such circumstances, if any, appearing in evidence, will be considered by you; and if you find beyond a reasonable doubt that the assets of said banking firm, at the time and place mentioned in the indictment, computing such assets at their reasonable cash value, without regard to cost, were insufficient in value to pay all the debts of said firm, under both the names of 'Cadwell's Bank' and 'Boyer Valley Bank,' within a reasonable time, in the ordinary course of business, then you will find that the said banking firm was then and there insolvent."

That portion of the instruction which reads: "The funds of a bank are supposed to be ready at hand to meet the wants of its patrons, and of the commercial, trading and manufacturing communities in which they are located," is quoted by appellants; and they urge that thereby the jury was given to understand that, unless the funds of defendants' banks were so ready, they were insolvent, and the rule is denounced as "fallacious" and "senseless." We think the greater mistake rests in attaching to the language a meaning not intended, and not properly deducible. The part of the instruction quoted does not pretend to give a rule as to insolvency, for that is definitely stated in another part of the same instruction. The instruction attempts to explain, somewhat, the general relation of banks to the public, evidently as an aid to the jury to better understand the definite rule as to solvency which is given, and, in determining the correctness of the rule,

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this language, of course, should be considered with the other, and from all the language determine the correctness of the proposition. The learned judge below is not without strong support, both as to the legality and propriety of the language used, for nearly the same language is used by a federal judge, of unquestioned learning and much experience, in the state of Missouri, in his charge to a jury, defining for it the word "insolvent," as used in a similar statute. We give to the clause of the instruction no greater approval than to say it is not vulnerable to the criticism made upon it.

Appellant refers to, and apparently relies with much confidence upon, the rule as announced in *McKown v. Furgasen*, 47 Iowa, 637, as properly defining the word "solvent." In that case the court below held the rule to be that a party, to be solvent, must have property sufficient to pay debts liable to execution. This court disapproved the rule, and said: "Solvency is ability to pay all debts or just claims. Insolvency is inability to pay such debts. A party may have this ability whose property is not subject to execution. Such persons cannot, in any proper sense, be said to be insolvent." This language is used in a case involving the fraudulent transfer of a note; the alleged fraud consisting in false representations as to the solvency of the maker. If the rule announced in that case is to obtain in all cases, then, of course, the court's instruction in this case is wrong, and the judgment should be reversed. We, however, think the rule as to solvency is not invariable. Its proper construction is dependent upon the conditions surrounding, and the purpose to be accomplished by its use. In the act in question, it is employed with reference to the security or protection of depositors in banks. It would certainly be a narrow construction to say that the law designed no more than to protect parties against absolute loss of money deposited. It would be nearer in harmony with the spirit and purpose of the law to say that its design was that depositors should receive their

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money in substantial accord with their understanding when deposited, and that any bank whose affairs are so situated that it cannot meet its demands in the usual course of business is, within the meaning of the law prohibiting the receipt of depositors, insolvent. If the letter of the statute will permit it, such a construction certainly meets the justice of the case. A statute certainly would not be open to criticism, from a standpoint of justice, whose provisions were that no institution, having the confidence of the people as a depository, should be permitted to receive their funds, even when their use must be to tide it over a period of uncertainty, and much less in view of a prospect of suspension. Depositors, with the knowledge of such facts, would not make the deposits, and hence their receipt, with silence as to the facts, is a fraud. Does our statute contemplate less than to make such fraud a crime? Insolvency bears close relation to, and in fact is necessarily a part of, the laws relating to assignments for the benefit of creditors, and of bankrupt acts; and in these connections the word has repeatedly received judicial construction.

The case of *Daniels v. Palmer* is a Minnesota case, reported in 35 Minn. 347; 29 N. W. Rep. 162; and the legal significance of the word in that case arises under the provisions of the insolvent laws of the state. We make the following quotations from the case, including authorities cited therein: "The court, in his charge, instructed the jury that 'an insolvent is a person whose estate is not sufficient to pay his debts, or one who is unable to pay his debts from his own means. A person is solvent who has property subject to legal process sufficient to satisfy all his legal obligations.' An exception to this instruction raises the principal question on this appeal, viz.: What constitutes insolvency, within the meaning of this statute? The term 'insolvency' is not always used in the same sense. It is sometimes used to denote the insufficiency of one's entire property and assets to pay all his debts. This is its popular and most general meaning. *Herrick v. Borst*, 4 Hill, 650.

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But it is also used, in a more restricted sense, to express the inability of a person to pay his debts in the ordinary course of business. This is the sense in which it has been invariably held to have been used in all the various bankrupt acts of England and America. In *Bayly v. Schofield*, 1 Maule & S. 338, it is said: “‘Insolvency,’ as respects a trader, means that he is not in condition to pay his debts in the ordinary course, as persons carrying on trade usually do, and it does not follow that he is not insolvent because he may ultimately have a surplus upon the winding up of his affairs.’ So, in *Shone v. Lucas*, 3 Dowl. & R. 218, it is said: “‘Insolvency,’ within the meaning of the bankrupt laws, does not mean an inability to pay twenty shillings on the pound, when the affairs of the bankrupt shall be ultimately wound up; but a trader is in insolvent circumstances when he is not in condition to pay his debts in the usual and ordinary course of trade.’ The same definition has been given of the term as used in the insolvent law of Massachusetts, which, in respect to the matter now under consideration, is very similar to our own. Gen. St. Mass. 1860, c. 118, sec. 89 (Pub. St. Mass. c. 157, sec. 96). In *Thompson v. Thompson*, 4 Cush. 127, SHAW, C. J., says: ‘By the term “insolvency,” however, as used in these statutes, we do not understand an absolute inability to pay one’s debts at some future time, upon a settlement and winding up of all a trader’s concerns, but a trader may be said to be in insolvent circumstances when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do.’ This definition has been repeatedly reasserted by the same court. *Lee v. Kilburn*, 3 Gray, 594; *Vennard v. McConnell*, 11 Allen, 561; *Barnard v. Crosby*, 6 Allen, 327. The same construction has been placed upon the term as used in the late United States bankrupt act. Rev. St. U. S., sec. 5128. In *Toof v. Martin*, 13 Wall. 40, the court, after referring to the more general and popular meaning of the word ‘insolvency,’ adds: ‘But it is also used, in a more restricted

sense, to express inability of a party to pay his debts as they become due in the ordinary course of business. It is in the latter sense that the term is used when traders and merchants are said to be "insolvent;" and, as applied to them, it is the sense intended in the act of congress.' To the same effect see *Wager v. Hall*, 16 Wall. 599; *Buchanan v. Smith*, 16 Wall. 308; *Dutcher v. Wright*, 94 U. S. 557; *Bank v. Cook*, 95 U. S. 342."

The supreme court of Pennsylvania, having the insolvency of a person under consideration, as bearing on his right to administer an estate, said: "Insolvency is the state of a person who, from any cause, is unable to pay his debts in the ordinary or usual course of trade. A man, to avoid insolvency, is not expected to be able, at once, to put his hand in his pocket, and pay every debt he owes, but he must be able to pay or to provide for all his debts as they fall due in the usual course of business." *Levan's Appeal*, 3 Atl. Rep. 804. That case has reference to a party not in business, but its importance lies in the fact that his solvency is being considered in relation to his legal capacity to receive and control the property of others; and the court, in that connection, seems to have given the word a restricted meaning, as is the case with regard to merchants and tradesmen.

The federal court in Missouri, having under consideration the word "solvent," as used in an act making it larceny for insolvent banks to receive deposits, which act, for the purpose of defining the word, is not different from ours, said in its charge to a jury: "In the ordinary acceptation of the term 'insolvent,' when applied to a bank, means inability to meet liabilities in the usual course of business. But a bank may be solvent, and yet, from temporary causes, over which its officers have no control, suspend until these causes can be overcome; but they must be causes for which prudence and foresight cannot provide, or over which the bank or its officers have no control, or could have none." The court afterwards added: "I pass to this branch of the case with the declaration that a bank is solvent,

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within the meaning of the constitution and statutes we are considering, when it possesses sufficient of assets to pay, within a reasonable time, all its liabilities, through its own agencies, and is insolvent when, from the uncertainty of being able to realize on its assets, in a reasonable time, a sufficient amount to meet its liabilities, it therefore makes an assignment by which the control of its affairs and property passes out of its hands." *Dodge v. Mastin*, 17 Fed. Rep. 665. It will be observed that the district court took the germ of the instruction under consideration from that case; and, when the entire instruction is considered, we think it is in harmony with the spirit of the law as generally interpreted, and that it is designed to meet the evident purpose of the statute.

Defendant asked some three instructions bearing on this particular branch of the case, some of which are the opposite of the rule we have approved. If one of them may be said to be in harmony with the rule, the ground is equally well covered by the instruction given.

VIII. Appellants asked instructions bearing on impeaching testimony, and complain of their refusal; but the court gave such as to properly guide the jury in that respect, and we will not consider them further.

IX. Appellants' last claim is that, under the testimony, the conviction cannot be sustained. That view of the case rests on a rule of law as to solvency at variance with that given by the court, and which we have approved. Under the rule given, and the testimony, there is little room for doubt that this firm was insolvent in May, 1888, and from that time forward was protracting its existence as a banking firm in violation of the laws of the state. It may be truthfully said that if the condition of the firm had been known for some years before its collapse no person would have ventured a deposit in its hands. Its deposits were received as a result of fraudulent concealments. It must be admitted that the defendants received deposits, and that of Mrs. Oliver among the rest, when they knew they could not meet the demands against them in the ordinary course of

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business. That they may have believed that, with time and indulgence, they could have settled all demands, is no excuse for taking the money of those who made their deposits under a different expectation. To our minds, the evidence sustains the verdict, and the judgment is

AFFIRMED.

CALLANAN *et al.* v. LEWIS.

Tax Sale and Deed : ACTION TO REDEEM : NEW TRIAL WITHOUT NOTICE : CERTIORARI. Plaintiffs brought this action in equity to redeem land from a tax sale and deed, on the ground that no notice of the expiration of the time of redemption was given, as required by section 894 of the Code, and they also asked that the rents be set off against the taxes, and that they have a writ of possession. Their prayer was granted, and decree entered accordingly. Afterwards, a purchaser from the defendant in that action moved the court for a new trial, which motion was granted without notice to plaintiffs, on the ground that the action was one to recover real property, and that, therefore, no notice of the motion for new trial was necessary, under Code, sections 8268 and 8269. But *held*—

- (1) That the action was brought under section 898 of the Code, to redeem from a tax sale after a deed had been executed, and that its character was not changed by the asking of other relief, which was merely incidental.
- (2) That the court had no jurisdiction to grant a new trial without notice to plaintiffs.
- (3) That *certiorari*, and not appeal, was their proper remedy, since they were not present to enter exceptions to the ruling, and appeal would have been unavailing.

Certiorari to Monona District Court.—HON. C. H. LEWIS, Judge.

FILED, FEBRUARY 7, 1890.

PROCEEDING by *certiorari* to determine the legality of defendant's action, as judge of the district court in and for the county of Monona, in granting a new

79	452
132	44
79	452
142	394

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trial in a certain action. The plaintiffs filed their petition in the district court of Monona county against L. M. and W. C. Carmichael, defendants, wherein they alleged that they were owners of certain lands described; that defendants claimed some interest therein by virtue of a tax deed; that said deed was null and void, for numerous reasons stated in the petition, among which are that no notice was served as required by section 894; that defendants had the actual possession of the premises, and wrongfully withheld the same; that the rents and profits were reasonably worth one hundred dollars per year; and praying that their title be quieted against the defendants; that the tax deed be set aside, that they be allowed to redeem; and that the rents be offset against the taxes; and "that plaintiffs have a writ of possession for said land," and such other relief as the court may determine them entitled to. The defendants, Carmichaels, appeared by attorney, and the case was continued under a stipulation of the attorneys, including an agreement as to the times to plead. Thereafter, on the sixth day of February, 1888, the cause came on for trial, and the defendants, Carmichaels, having failed to answer or plead, default was entered against them and a decree rendered in favor of plaintiffs, granting them the right to redeem from the tax sale, and finding that the amount due was \$30.55. It was further decreed that the plaintiffs' title be quieted and established against the defendants, that the tax deed be set aside; that the plaintiffs pay said sum of \$30.55 to the clerk, for the benefit of the defendants; that the defendants be allowed to remove all fences or improvements from the premises which they placed thereon; that, upon the payment of said \$30.55 and interest, the plaintiffs have a writ placing them in possession; and that the plaintiffs recover costs.

On the twenty-seventh day of November, 1888, Stephen Tillson, who was not a party to said cause, filed in the office of the clerk of said county a motion, supported by affidavits, for a new trial in said cause,

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stating that on the twenty-fifth day of January, 1888, he had, for valuable consideration, purchased, under a fee-simple deed, the land in controversy, from L. M. and W. C. Carmichael; that, after rendition of said judgment and decree, W. C. Carmichael, without his knowledge or consent, drew the \$30.55 from the clerk, which amount was then tendered back to the plaintiff, with ten per cent. interest. The motion states that at the September term, 1885, of said district court, in an action wherein L. W. Carmichael was plaintiff and the American Emigrant Company, under whom these plaintiffs claim title, was defendant, judgment was entered against the said company, quieting Carmichael's title to said lands under said tax deeds; that Callanan and Savery purchased with full knowledge of said decree, for an inadequate consideration of one dollar, and withheld their deed from record until April 13, 1888. The defendants, Carmichaels, had no knowledge of said decree against the American Emigrant Company, or, if they ever had, they had forgotten or misunderstood the same, and that the said Tillson had no knowledge thereof until after the decree in the cause at bar was rendered; that he and said Carmichaels believed that no possible defense to the plaintiffs' petition could be interposed, not knowing of said former decree; that the plaintiffs fraudulently concealed the fact of said decree from the knowledge of the court, for the purpose of securing the judgment and decree in the case at bar; that the same issues were adjudicated in the former case, which is a bar to this; wherefore said Tillson asks that said decree be set aside and a new trial granted, "as provided by section 3268, Code;" and that he be permitted to answer and plead to plaintiffs' petition, and contest their claim in this action.

No notice of this motion for new trial was served upon these plaintiffs, nor upon their attorney; and on the twenty-eighth day of November, 1888, the motion was heard without any appearance on behalf of the plaintiffs, and the court sustained said motion, and

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ordered a new trial. Thereafter, on January 8, 1889, said Tillson filed his answer, and on January 28, 1889, an amendment thereto, joining issue with plaintiffs' petition against the Carmichaels.

H. E. Long, for plaintiffs.

Oliver Bros. & Tillson, for defendant.

GIVEN, J.—I. It is claimed on behalf of the plaintiffs that their action against Carmichaels was under section 893, Code; and that the defendant exceeded his jurisdiction, and proceeded illegally, in sustaining the motion of Tillson to set aside the decree, and for a new trial, because no notice thereof was given to the plaintiffs. It is claimed on behalf of the defendants that said action was under chapter 2, title 20, Code, and the motion under section 3268, contained in said chapter, and under which no notice is required. It is not questioned but that, if the action was under section 893, notice of the motion for a new trial was required, and, if under chapter 2, it was not. Section 893 provides: "Any person entitled to redeem land sold for taxes, after the delivery of the deed, shall redeem the same by an equitable action; * * * and no person shall be allowed to redeem land sold for taxes, in any other manner, after the service of the notice provided for by the next section, and the execution and delivery of the treasurer's deed." "Any person having a valid subsisting interest in real property, and a right to the immediate possession thereof, may recover the same by action against any person acting as owner, landlord or tenant of the property claimed." Code, sec. 3246. "An action to determine and quiet the title of real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession." Code, sec. 3273. Defendant maintains that the deed and "service of notice," referred to in section 893, mean a valid deed, and completed and legal service of notice and deed. Thus construed, no

action could be brought under said section 893, except by or on behalf of minors and lunatics. A failure to serve the notice to redeem, or to file the proof of such service before the execution of the deed, does not render the deed void, and the land remains subject to redemption. The deed conveys the title to the purchaser, who holds it subject to be defeated by redemption of the lands. *Bowers v. Hallock*, 71 Iowa, 218. Until this deed was set aside and redemption made, the plaintiffs were not entitled to immediate possession, and hence could not proceed under section 3246; neither was this an action to determine and quiet title alone. The principal and controlling relief sought was to be permitted to redeem from the tax sale, and the other relief asked is dependent upon such right, and a mere incident in the case. The provision of section 893, that no person shall be allowed to redeem in any other manner than by equitable action, after the service of notice, and execution and delivery of the deed, does not mean a completed and legal service or a valid deed. The equitable action to redeem, on the grounds of insufficient notice or service, may be maintained under this section. The following cases have more or less bearing upon the subject: *Bowers v. Hallock*, *supra*; *Long v. Smith*, 67 Iowa, 22. *Buena Vista County v. Railway Co.*, 49 Iowa, 657, was an action under chapter 2, title 20. The court held that the fact that the petition, in addition to asking that plaintiff's title be quieted, prays other relief in regard to the land, will not take the case out of the provision of chapter 2, title 20, Code, in relation to granting new trials in actions to quiet title. This action being properly brought under section 893, the same rule applies; and the fact that other relief is asked in regard to the land will not take the case out of the provisions of that section. Our conclusion is that the plaintiffs were entitled to notice of this motion for a new trial, and that the court exceeded its jurisdiction, and proceeded illegally, in sustaining the motion without such notice.

The State v. Gaston.

II. Defendants' further contention is that the plaintiffs have a plain, speedy and adequate remedy by appeal. As we have seen, the court had no jurisdiction of the plaintiffs for the purpose of the motion for a new trial, because they had no notice thereof. The entertaining and sustaining of the motion was, therefore, absolutely void, and, as the order sustaining the motion was made in the absence of the plaintiffs in the action, no exception could be taken, and hence an appeal would have been ineffectual. The plaintiffs might have moved the court at the succeeding term to set this order aside, but they were not bound to do this, for the court did not have jurisdiction to make the order. See *Hawkeye Ins. Co. v. Duffie*, 67 Iowa, 175. The order and judgment of the district court, granting a new trial, is set aside and

REVERSED.

THE STATE V. GASTON.

1. **Justices of the Peace : ELECTION : NUMBER : VALIDITY.** In order to make valid the election of one or two additional justices of the peace in a township, under section 592 of the Code, the trustees must not only so direct, and post up notices accordingly, but such direction must be made a matter of record in the proceedings of the trustees (Code, section 395); and where such notices were posted, but no recorded direction was made, and four justices were voted for, only the two who received the highest number of votes were lawfully elected.
2. **Quo Warranto : APPEAL : TRIAL.** A proceeding by *quo warranto* is not triable anew in this court; and the finding of fact by the trial court will not be set aside where there is some evidence to support it.

Appeal from Polk District Court.—HON. O. B. AYRES,
Judge.

FILED, FEBRUARY 8, 1890.

QUO WARRANTO to determine the right of defendant to fill the office of justice of the peace. The cause was tried without a jury, and judgment was rendered for the state, ousting defendant from the office. He now appeals.

Baker & Haskins, for appellant.

C. P. Holmes and *J. K. Macomber*, County Attorney, for the State.

BECK, J.—I. The facts upon which rests the decision of the questions involved in the case are these: Prior to 1886, Valley township, Polk county, was authorized to elect two justices of the peace. At the election in that year four justices were elected and qualified. Defendant was one of the number. Notices of the election of that number of justices were posted as required by law. At the election of 1888 four justices were again voted for, defendant being one of the number, all of whom received a majority of all the votes cast, but defendant's vote was not equal in number to the separate votes of the others. The two having the highest number of votes qualified as prescribed by law, but defendant and the other person having a less number of votes were not permitted to qualify. The defendant, however, claims that he has the right to fill the office until his successor is elected and qualified, and that he is entitled to hold the office if not qualified, as no successor has been qualified. The state maintains that defendant cannot lawfully hold the office, for the reason that the election of more than two justices of the peace in the township is unauthorized by law.

II. This position of the state is supported by the following provisions of the statutes and the facts we shall state. Code, section 590, provides for the election of two justices in each township. Section 592 is in the following language: "One or two additional justices of the peace, and one or two additional constables, may be

1. JUSTICES of the peace: election: number: validity.

The State v. Gaston.

elected in each township, if the trustees so direct by posting up notices of the same, in three of the most public places in the township, at least ten days before election." Under this section, to authorize the election of more than two justices, direction therefor must be given by notices posted as prescribed by the statute. But it plainly appears that, as an accurate record of the proceedings and orders of the trustees must be kept, the law requires the direction in question to be entered therein. See Code, sec. 395. Considerations of public policy and presumptions as to the intention of the legislature which, under the circumstances, we are required to entertain, clearly direct to this conclusion. Could the number of justices of the peace—officers of so much importance, in view of their functions and powers—be increased without recorded action of the trustees, uncertainty and abuses would arise therefrom. It is to be presumed that the legislature intended nothing of the kind, but rather that record of the increase of the number be kept. But it is admitted that there is no record of any direction or order of the trustees for an increase of the number of the justices of the peace. We are therefore required to hold, in harmony with the view we have announced, that no more than two justices may be elected in the township.

III. The court below could well have found upon the evidence that no verbal direction was in fact ever made by the trustees for the election of four justices. Such a finding has support in the evidence, and we cannot disturb it in this proceeding, which is an action at law, and is not triable here *de novo*. Code, sec. 3345. It will be remembered that the burden rested on defendant to show that the trustees did direct the election of four justices of the peace. The court was authorized to find that defendant failed to establish either verbal or recorded direction on the subject. It follows that, as the defendant failed to establish his right to the office under his prior or later election, the district court rightly entered judgment ousting him therefrom.

2. QUO WARRANTO: appeal: trial.

AFFIRMED.

79 460
115 118

THE STATE V. EMPEY.

1. **Criminal Law : " AIDING AND ABETTING."** The word "abet," used in relation to the commission of a crime, indicates the act of an accessory before the fact, while the word "aid" indicates the act of an accessory after the fact. An accessory before the fact may be indicted, punished and tried as a principal (Code, sec. 4314); whether the same is true of an accessory after the fact, is not determined.
2. ——— : **LARCENY : AIDING IN DISPOSING OF PROPERTY : INSTRUCTION.** One who aids in the disposition of stolen property is not thereby guilty of larceny, either as principal or accessory, unless he knows the property to have been stolen; and an instruction under which the jury might have found defendant guilty without such knowledge is a ground for reversal, even though the abstract does not contain all the evidence; for it cannot be presumed that his guilty knowledge was established by the evidence.

Appeal from Linn District Court.—HON. J. H.
PRESTON, Judge.

FILED, FEBRUARY 8, 1890.

DEFENDANT was convicted on an indictment for larceny, and now appeals to this court.

Charles J. Kepler, for appellant.

J. Y. Stone, Attorney General, for the State.

BECK, J.—I. The abstract upon which the case is submitted to us for decision does not contain a copy of the indictment, or a statement of its contents, nor any part of the evidence. The instructions to the jury are set out in full, and the only objections to the judgment are based upon the fourth instruction, which is in the following language: "4. It is not claimed by the state that the defendant was actually present and assisted in the taking of said property, but that he planned, aided and abetted the taking and disposition thereof; and, under the law of this state, all persons concerned in the

The State v. Empey.

commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet its commission, though not present, are equally guilty as the person who did actually commit the act; and if you find from the evidence that the witness Frank Watkins, at the time or place charged, did steal, take and carry away said property, or some portion thereof, that the same was the property of M. D. Snyder, and of the value of ninety dollars, or of some actual value, then said Watkins is guilty of larceny; and if you further find from the evidence that defendant planned, aided or abetted the commission of said larceny, though not present at its commission, then he is equally guilty as Watkins; or if you find therefrom that, after the commission of said act, the defendant aided, abetted or assisted said Watkins in the disposition of said property, then he will be guilty. If you fail to so find, then you will find the defendant not guilty."

II. It is first insisted that this instruction errs in directing the jury that, if defendant aided or abetted the commission of the larceny, he is equally guilty with the one who actually stole the goods. The error, it is urged, consists in the use of the disjunctive conjunction "or," instead of the conjunction "and." We think the words "aid" and "abet" are not synonymous, as is argued by the attorney general. To "abet" is to encourage, counsel, incite or instigate the commission of a crime. The word indicates the act of an accessory before the fact. To "aid" is to support, the words describing the act of an accessory after the fact. An accessory before the fact may be indicted, tried and punished as a principal. Code, sec. 4314. The question whether an accessory after the fact may be indicted and convicted in the same way has not been determined, so far as we are advised. In view of all the language of the section just cited, which provides that those who aid and abet the commission of the crime may be indicted, tried and punished as principals, it would seem that the word "aid" applies to and points out accessories after the fact, who are therefore included

The State v. Hodgson.

in its provision. See, in this connection, Code, sec. 4315. This question we need not determine, in view of the facts that the indictment is not set out, nor its contents stated, in the abstract. We cannot, therefore, say that it is in the case.

III. The last sentence of the instruction is plainly erroneous in holding that assistance in the disposition of stolen property will render one guilty. Surely, assistance in disposing of the property, without the knowledge that it was stolen, will not be the ground of charging one either as principal or as an accessory. Knowledge of the crime is essential to constitute an accessory after the fact. 1 Bish. Crimes, secs. 487, 488; 1 Russ. Crimes, 38. The attorney general does not claim that this instruction is not objectionable on the last ground named, but expresses the opinion that we cannot reverse, for the reason that all the evidence is not made to appear affirmatively. There must have been an issue as to defendant's knowledge of the crime, as he was tried as an accessory after the fact, for such knowledge is an essential ingredient of guilt of such an accessory. That issue was for the jury's determination, and, though the evidence may have all pointed to such knowledge, the court could not direct a verdict thereon, or what finding the jury should make. We, therefore, can exercise no presumption that the evidence established defendant's knowledge of the larceny, and, therefore, his guilt, and thereon hold that the instruction is without prejudice. For the error in this instruction the judgment of the district court is

REVERSED

THE STATE v. HODGSON.

1. **Appeal: FROM ORDER TAXING COSTS TO PROSECUTOR: TIME OF TAKING.** An appeal from a judgment taxing the costs of a prosecution upon information to the prosecuting witness, on the ground that the prosecution was without probable cause, is an appeal in a criminal case, and may be taken within one year from the date of the judgment. (Code, sec. 4522, and *State v. Knapf*, 61 Iowa, 522.)

The State v. Hodgson.

2. **Criminal Law: INFORMATION: TAXING COSTS TO INFORMANT.** Where the defendant in an information is convicted before a justice of the peace, and he appeals to the district court, the conviction is conclusive proof that there was probable cause for the information, and the district court cannot inquire into that matter and tax the costs to the informant on the ground that there was no probable cause for the information. (*In re Trenchard*, 16 Iowa, 58, distinguished.)

Appeal from Cedar District Court.—HON. J. H. PRESTON, Judge.

FILED, FEBRUARY 8, 1890.

THE defendant was arrested on information before a justice of the peace, charged with being intoxicated. The information upon which the warrant issued was filed by George Heppenstall and Levi Pilkinton. At the trial before the justice the defendant was convicted, and from a judgment he appealed to the district court, in which he was acquitted. The district court found that the prosecution was without probable cause, and taxed the costs of the proceedings in both courts to the prosecuting witnesses, and this appeal is at their instance from such judgment for costs.

Wolf & Hanly, for appellant

R. G. Cousins, for appellee.

GRANGER, J.—I. Our attention is first directed to a motion to dismiss the appeal, for the reason that it was not taken within the time prescribed by the law. The motion seems to be based on the provisions of section 3173 of the Code, which has reference to appeals in civil cases. Section 4522 is in the Code of Criminal Procedure, and provides: "No appeal can be taken until after judgment, and then only within one year thereafter." The proceeding in which the judgment appealed from was rendered was a criminal one, and the judgment is very much in the nature of a penalty. But, however that may be, the

1. APPEAL: from order taxing costs to prosecutor: time of taking.

point seems to have been before ruled, and to the effect that an appeal like this is an appeal in a criminal action. *State v. Knapf*, 61 Iowa, 522. With either view of the case as to the time the judgment was really entered, the appeal was taken within the year, and the motion to dismiss the appeal is refused.

II. In the justice's court the defendant was convicted of the crime of which he was charged, and it is urged by appellant that such fact should bar any after inquiry as to a probable cause for filing the complaint. Appellee relies upon *In re Trenchard*, 16 Iowa, 53, to justify the action of the district court in this case. In the *Trenchard* case the parties were arrested, and, because of Trenchard's failure to appear, the defendants were discharged, and the state, under a section of the Revision authorizing it, appealed, and on a jury trial in the district court the defendants were acquitted. The district court, on the ground of a want of probable cause for the prosecution, taxed the costs to the prosecuting witness. This court sustained the action, and because of some language in the opinion appellee regards it as applicable to the facts of this case. In that view we do not concur. At the first trial in this case there was a conviction which was entirely inconsistent with the fact of a want of probable cause in the institution of the proceeding. On appeal in these cases the testimony is often—in fact, in most cases—different. Witnesses die, remove beyond the reach of the process of the court, or for other causes are absent. In very many cases, where the testimony on a first hearing is abundantly sufficient to sustain a conviction, on a retrial it is entirely insufficient, so much so as on its face to evidence a want of probable cause, or even bad faith in making the complaint. It is the policy of the law to encourage the filing of just complaints, and, of course, equally its policy to discourage unjust ones. There is a seeming duty devolving on a prosecutor before a justice of the peace to aid the court, by way of information, at least,

2. CRIMINAL law:
information:
taxing costs to
informant.

The State v. Hodgson.

in the discovery of testimony, to the end that the facts may be established. When that is done, and there is a conviction, the public is as fully in possession of the means for vindicating the law as the prosecutor, and no such duty further devolves upon him. The public is in possession of the testimony on which a conviction has been secured. If it is thought insufficient, notwithstanding the judgment, the public, by its representative, should ask the district court on appeal to dismiss the information, and not itself prosecute, when there is no probable cause for prosecution, and then tax the costs of its own mistake or neglect to the complainant. When the public, with such information, attempts to sustain a conviction on appeal, its action is an indorsement of the complaint, and the law never intended that the further prosecution should be on any such contingency as to costs. In so far as the law contemplates a duty on the part of a private prosecutor, the appellants in this case discharged their duty, and the judgment of the justice was a vindication of their action. That was not true of the *Trenchard case*. As we read the record, he abandoned the case before the justice, and the first inquiry as to the facts, where the truth as to the probable cause could be known judicially, was in the district court. The facts of the two cases are widely different, and the language of the opinion in that case, though pertinent to the facts then before the court, should not be understood as announcing a rule to govern in a case like this. It is highly important, in weighing the statements of an opinion, to do so in the full light of the facts to which they apply. We think the judgment of conviction in justice's court is a bar to any further inquiry as to appellant's liability for costs. The judgment of the district court is

REVERSED.

THE STATE *ex rel.* WILCOX v. VREELAND.

THE SAME v. WILLARD.

School Districts: POPULATION: NUMBER OF DIRECTORS. Where an independent school district has had a population of five hundred, and so has been entitled to and has had six directors, two elected each year, but the population has fallen below that number, only one director should be elected each year. (*State v. Simkins*, 77 Iowa, 676, *followed*.)

Appeal from Tama District Court.—HON. L. G. KINNE
Judge.

FILED, FEBRUARY 8, 1890.

ACTIONS to determine the right of the defendants, respectively, to exercise the office of director of the independent district of Montour, Tama county, Iowa. This district was organized in 1872, and, having a population of five hundred or more, six directors were elected and qualified, and two were elected and qualified each year thereafter, without question, until 1888. At the time of the election in March, 1888, one of the "hold-over" directors had resigned, and the terms of two expired under the law. The board, assuming that the district was still entitled to six directors, proceeded to hold an election for one director to fill vacancy, and two for full term. The defendants were candidates for the full terms, and received the highest number of votes cast for candidates for the full term, each receiving the same number of votes. They both qualified, and proceeded to act as directors of said independent district. The cases, resting upon the same facts, and involving the same questions, were submitted together to the district court, and are again so submitted. That court found, among other facts, that on March 12, 1888, said district contained less than five hundred population, and was, therefore, only entitled to one director; and that, as defendants were each candidates on the supposition that two directors were to be elected, when in fact there was

The State v. Benzion.

legally but one, neither of them is a director of said district; and adjudged that they, and each of them, be ousted from said office, from which judgments defendants each appeal.

J. W. Willett, for appellants.

Stivers & Strong, for appellee.

GIVEN, J.—No question is made but that at the time of the election, March 12, 1888, the population of this district was less than five hundred. In section 1802, Code, authorizing the organization of independent districts, it is provided “that, in all independent districts having a population of less than five hundred, there shall be three directors elected, who shall organize by electing a president,” etc. Appellants’ contention is that this district having had the requisite population at its organization to entitle it to six directors, and there being no provision for ascertaining the population thereafter, nor for reducing the number of directors in case the population diminishes, the district will always be entitled to six directors. This position is fully answered in *State v. Simkins*, 77 Iowa, 676. The court says: “When the population of the district falls below five hundred, should the number of the directors be diminished accordingly? We think that, under section 1808 of the Code, if the population be less than five hundred at the time of the election, two members should not be elected.” We see no reason for changing this view of the law. It follows that the judgment of the district court must be AFFIRMED.

THE STATE V. BENZION *et al.*

1. **Bail-bond : RECITATIONS OF : ESTOPPEL.** A surety in a bail-bond, which recites that an adjournment of the case was ordered, and that the bond was executed to give the accused the benefit of the order, cannot, when the obligation is about to be enforced, deny these recitations, and plead as a defense that the bond was executed before the accused was brought before the court.

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2. ——— : PREPARATION OF IN ANTICIPATION OF AN ADJOURNMENT. It is no objection to the validity of a bail-bond that it was prepared and signed before the accused was brought before the justice, in anticipation of an application for an adjournment. (Compare sec. 4189 of the Code.)
8. ——— : SURETY : DISCHARGE BY CONTINUANCES. A surety cannot be exonerated from liability on a bail-bond on the ground that the preliminary hearing was several times continued by agreement without his consent, and without the appearance of the accused when the continuances were ordered.

Appeal from Marshall District Court.—HON. J. L. STEVENS, Judge.

FILED, FEBRUARY 8, 1890.

ACTION upon a bail-bond for the appearance of Benzion to answer to an information filed before a justice of the peace charging him with a misdemeanor. Horton, the surety in the recognizance, demurred to the petition. The demurrer was overruled, and the surety appeals.

J. M. Parker, for appellant.

W. W. Miller, for appellees.

BECK, J.—I. The petition alleges that defendant Benzion was arrested on the third day of July upon a warrant issued by a justice of the peace ; that a continuance was ordered by the justice to the tenth day of July, and thereupon he, and the defendant as surety, entered into a bail-bond, in the usual form, for the appearance of the accused at a day fixed for the trial, and to abide the order of the court in the premises ; that the cause, upon the consent of the defendant and the state, was twice continued after the first continuance, when the accused was required to appear before the district court, but he failed to appear and obey the order of the justice made in said proceedings, and

The State v. Benzion.

thereupon a default was taken against the defendants. As the questions in the case arise upon the overruling of a demurrer to the answer, it becomes necessary to set out the pleading. It is as follows: "Comes now the defendant James Horton, and for answer to the petition says that he admits the making of the bond set out in the petition, and the plaintiff's right of recovery thereon, except for the following matters in avoidance and defense thereof; that is to say: Said bond was signed by the said Horton at Gilman when the arrest of the defendant Benzion was made, some fourteen miles distant from the office of the said Justice BURRITT, who issued the warrant. The signing took place before the return of the warrant, and before the defendant Benzion had been brought before the justice, and before the adjournment had been made to the tenth day of July, 1888, or any order therefor, and before the said justice had acquired jurisdiction in the case. Afterwards the defendant Benzion was brought before the said Justice BURRITT, and the cause adjourned until July 10, 1888. But before that day arrived, without the knowledge or consent of this defendant Horton the state, by its attorney, and Benzion's attorney, without cause, continued the case until the twentieth or twenty-first of July, but which day the defendant is unable to say. That the several continuances made, as specified in the petition, were made without the appearance of the defendant Benzion, or the attorneys for the parties, and were all without any cause whatever. And defendant avers that said adjournments were made by the respective attorneys at their offices, or upon the street, to accommodate themselves as to other legal business; and several of the continuances were expressly made until after other causes should be tried, and to abide the event of the same, and the adjournments were made upon such contingencies, and no other cause, express or implied. That by reason of the confusion and uncertainty caused by said adjournments this defendant was deprived of his right as surety from delivering

up said Benzion, or taking indemnity for his liability, which he otherwise might have done.

II. It will be observed that the answer alleges, in effect, that the accused was brought before the justice after arrest, and thereupon the cause was continued to the tenth day of July. But the recognizance was signed before the accused was brought before the justice, and before the order for the adjournment had been made. The answer, it will be observed, pleads as a defense the fact that the bail-bond was signed before the accused was brought before the justice. It is clear that the defendant, having executed the bond, which recites that an adjournment of the case was ordered, and that the obligation was executed to give the accused the benefit of the order, cannot now, when the obligation is about to be enforced, deny these recitations. They are in the nature of admissions, which defendant ought not to be permitted to dispute.

II. But there was no irregularity in permitting the accused to prepare his recognizance in anticipation of an application for an adjournment, and secure the signature of a surety. To permit him to do so is in favor of exemption from unnecessary restraint of his liberty, and is to his own advantage. Surely his surety, who became bound by the bond, should not be permitted to deny his obligation thereon, when it accomplishes just the thing he intended, namely, the release of the accused from custody. The objection is technical, and is not commended by justice or necessity for the protection of the rights and liberty of the accused.

The statute provides that one charged with a misdemeanor may give bail to the officer making the arrest, the magistrate being required to indorse on the warrant the amount of bail, and directions for the enlargement of the accused upon his giving it. Code, sec. 4189. The statute thus provides that the accused may be admitted to bail without appearing before the

1. BAIL-BOND:
recitations
of: estoppel.

2. — : prepar-
ation of in
anticipation
of an adjourn-
ment.

The State v. Benzion.

magistrate. This statute is in accord with the spirit of our law, which was followed by recognizing the validity of the recognizance in this case.

III. An amended abstract shows that the adjournments were not for a period exceeding thirty days, as prescribed by Code, section 4230. It is alleged that the cause was continued without defendant's consent, but with the consent of the accused and the state, and that the adjournments were made by the agreement of the counsel for the parties, entered into at their offices, and there was in fact no appearance before the magistrate when the adjournments were made. It is not alleged that the accused did not consent to the adjournments. They are not shown to have been irregularly made. The defendant's obligation follows the accused, and is binding until the accused be discharged. It will be observed that the defendants by it became bound that the accused would obey the order of the court. By the order for continuance the accused was, if not by express language, impliedly ordered and required to appear and answer further, and obey the final order of the court. By default as to this order the defendant became liable. *State v. Brown*, 16 Iowa, 314. The defendant, in contemplation of law, was, as the surety of the accused, his custodian,—“the jailer of his own choosing.” *State v. Brown, supra*. He could have exonerated himself at any time by surrendering the accused in discharge of the bail. He did not do this. He has therefore no ground of complaint. He failed to take the steps provided by law for his exoneration. He must discharge the duty and obligation he assumed by becoming bail, by paying the penalty fixed in the recognizance for the default of the accused. These views dispose of all questions arising in the case. The judgment of the district court is

AFFIRMED.

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THE STATE V. BAHNE.

THE SAME V. MCATEE.

1. **Criminal Law: APPEAL: AFFIRMANCE ON MOTION.** Section 4538 of the Code, which requires this court to examine the record in criminal cases appealed, and, without regard to technical errors or defects, render such judgment on the record as the law demands, forbids the affirmance of a judgment of conviction upon motion of the state.
2. ———: ———: **JUDGMENT ON APPEAL BOND.** Upon the affirmance of a judgment of conviction, this court cannot render judgment upon the appeal bond when the bond is not before the court.

Appeals from Polk District Court.—HON. W. H. McHENRY, Judge.

FILED, FEBRUARY 8, 1890.

THE defendant in each case was convicted upon an indictment for maintaining a nuisance by keeping a place for the unlawful sale of intoxicating liquors. Each defendant appeals to this court.

W. S. Sickmon, for appellants.

J. Y. Stone, Attorney General, and *J. K. Macomber*, for the State.

BECK, J.—I. The counsel for the state move to affirm the judgment in each case, and that judgment be rendered in this court against the sureties in the appeal bond. We cannot entertain a motion to affirm a criminal case. We are required to examine the record, and, without regard to technical errors or defects, to render such judgment on the record as the law demands. Code, sec. 4538.

II. We infer, as defendants made no objection to the records before us, that they are brought here by the

The State v. Cadwell.

2. —:—:
judgment on
appeal bond. defendants pursuant to their respective appeals. Neither of the records contains more than the indictment, judgment, notice of appeal and authentication thereof made by the clerk. There appears no error or irregularity upon the face of the record before us. The judgment of the district court must be affirmed, and each case must be remanded for the enforcement of the judgment in the court below. No judgment could be entered in either case on the appeal bond in this court, for the reason, if for no other, that the bond is not before us. **AFFIRMED.**

THE STATE V. CADWELL.

1. **False Pretenses: DRAFT DRAWN AGAINST NO FUNDS: INDICTMENT: SUFFICIENCY.** The indictment in this case charges the defendant with obtaining money and property upon the false pretense that he had money in a certain bank, upon which he drew a draft which he gave in exchange for the money and property. Upon examination of the indictment (see opinion), *held* that it was not vulnerable to the objection that the facts constituting the offense were not set out with sufficient fulness,—the averments being sufficient to inform defendant of the charge against him, and of the facts which could properly be shown to prove it; nor to the objection that it did not show when the draft was payable,—it sufficiently appearing from the language used that it was payable at sight.
2. **Criminal Law: CHANGE OF VENUE: DISCRETION OF COURT.** An application for a change of venue in a criminal case, based upon the alleged prejudice of the people of the county, and supported by affidavits and resisted by counter-affidavits, is addressed to the sound discretion of the trial court, which this court will not interfere with in the absence of a showing of abuse.
3. **False Pretenses: DRAFT DRAWN AGAINST NO FUNDS: INDICTMENT AND PROOF.** The indictment charged defendant with drawing a draft upon a bank in which he had no funds, and delivering it in exchange for money and property. Defendant and another were partners in the banking business, and the draft in question was drawn in the name of the bank owned by them, by himself as cashier. *Held* that it was not admissible in evidence to sustain the indictment, because it was not his draft, and was not payable out of his funds, if he had any, in the bank upon which it was drawn.

79	473
80	113
79	473
98	323

The State v. Cadwell.

Appeal from Harrison District Court.—HON. SCOTT M. LADD, Judge.

FILED, FEBRUARY 8, 1890.

DEFENDANT was convicted of the crime of obtaining money by false pretenses. He was adjudged to be imprisoned in the penitentiary at Fort Madison for the period of twenty-one months, and from that judgment he appeals.

L. R. Bolter & Sons and *J. W. Barnhart*, for appellant.

John Y. Stone, Attorney General, for the State.

ROBINSON, J.—The indictment charges that the alleged offense was committed as follows: “That W.C. Cadwell, on or about the eighth day of October, 1888, in the county aforesaid, with intent to defraud one H. W. Bostwick of his money and property, did designedly, falsely and fraudulently represent to him, said Bostwick, that he, said defendant, had on deposit in the Citizens’ Bank of Council Bluffs, Iowa, money subject to draft, which representations were false, and were known to defendant to be false, and were made by defendant with intent to defraud, and obtain from said Bostwick money and property of the value of \$1,148.75 in currency, checks, drafts and bills of exchange, a more particular description of which is to the grand jurors unknown, in exchange for a draft given by said defendant to said Bostwick, and drawn upon said Citizens’ Bank of Council Bluffs, for the sum of \$1,148.75, which draft defendant well knew to be of no value. And said Bostwick, believing said representations made by defendant to be true, and, being deceived thereby, was induced by reason of said false representations and false pretenses to part with his said money and property, and accept said draft of defendant therefor, believing said draft would be paid on presentation

thereof for payment at said Citizens' Bank, and which said draft, or the payment thereof, was refused by said bank when presented, whereas, in truth and in fact, said defendant had no money on deposit to meet said draft in said Citizens' Bank on said day, or at any time since; all of which was well known to defendant, and defendant knew at the time of making the alleged representations to said Bostwick that such representations, regarding the money on deposit in said Citizens' Bank, to meet the payment of said draft, were false, and were made designedly, and by false pretense, and with intent to deceive and obtain from said Bostwick money, goods and property." A demurrer to the indictment was overruled. To that ruling the defendant excepted.

I. The first objection to the indictment raised by the demurrer is that the facts constituting the offense charged are not set out with sufficient fullness. The *gravamen* of the charge is that defendant, by means of false pretenses, obtained of Bostwick, on the date named, money and other property of the value of \$1,148.75 in currency, checks, drafts and bills of exchange, a particular description of which the grand jurors could not give; that the false pretenses consisted of representations; that the draft given by defendant for said property was drawn against funds with which it would be paid on presentation; and that Bostwick believed and relied upon such representations, and was deceived by them. The date of drawing the draft, its amount, and the name of the bank on which it was drawn, were specified. Those statements were certainly sufficient to inform defendant of the charge against him, and of the facts which could properly be shown to prove it. It, therefore, met the requirements of the statute. See Code, sec. 4296.

II. The next objection urged to the indictment is that it does not show whether the draft given to Bostwick was payable on presentation, or at some later

1. FALSE pre-
tenses: draft
drawn against
no funds:
indictment:
sufficiency.

date; that it is silent as to what representations, if any, defendant made as to time of payment; and that the draft may not have been due when the indictment was found. The indictment charges that defendant falsely, and with fraudulent intent, represented that he had money on deposit with the Citizens' Bank, subject to draft; that said draft was presented for payment, and payment refused by the bank on which it was drawn. The averment is positive, in substance, that defendant represented that he had money on deposit subject to draft, and that such representation was false, and known to defendant to be so, when made, and that he had not had money on deposit subject to draft since that time. The language of the indictment could have been much improved, but, we think, taken as a whole, it shows with reasonable certainty that defendant drew the draft he gave to Bostwick; that it was due when presented, and when payment was refused; that defendant represented that it was drawn against funds; and that the statement was false, and was known to him when made to be false, and was relied upon by Bostwick, who believed it to be true. It was not necessary to set the draft out in the indictment, nor to allege that it was of no value. We conclude that the action of the court in overruling the demurrer was correct.

III. Before the trial to the jury was commenced defendant applied for a change of venue, on the ground of excitement and prejudice against him in the county where the cause was pending. His petition was supported by his own affidavit, and the affidavits of about fifty residents of the county. In opposition to the petition, the state filed the affidavits of seventy-seven such residents. The petition was denied, and defendant complains of that ruling. The application should have been decided by the court in the exercise of a sound discretion. Code, sec. 4374, as amended. We discover no evidence that the discretion given by the statute was abused.

IV. It is shown by the evidence that, when the draft in question was given, the defendant and his father,

2. CRIMINAL law:
change of
venue: dis-
cretion of
court.

The State v. Cadwell.

3. FALSE pre-
tenses: draft
drawn
against no
funds: indict-
and proof.

Phineas Cadwell, were engaged as copartners in doing a banking business at Woodbine and Logan. The business of the firm was carried on at Woodbine under the name of the "Boyer Valley Bank," and at Logan under the name of "Cadwell's Bank." Defendant acted as the cashier of the Boyer Valley Bank. H. M. Bostwick was cashier of the Commercial Banking Company of Woodbine. On the eighth day of October, 1888, near the close of banking hours, Bostwick, in his official capacity as cashier, went to the Boyer Valley Bank to collect of it a draft on it for one thousand dollars, drawn by Cadwell's Bank, at Logan, payable to Officer & Pusey, and indorsed and forwarded by them for collection and credit. Bostwick also presented at the same time, for payment, four checks on the Boyer Valley Bank, two of which amounted to two hundred and sixteen dollars. At that time the Boyer Valley Bank held checks drawn on the Commercial Banking Company. In exchange for the draft and checks presented by Bostwick,—checks his bank held on the banking company,—defendant, as cashier, delivered to him the draft in controversy. It was for \$1,148.75, and was drawn by defendant as cashier, in the name of the Boyer Valley Bank. When the state offered it in evidence, it was objected to as immaterial, incompetent and irrelevant, not purporting to be a draft drawn by defendant, as stated in the indictment. The objection was overruled, and the draft was introduced in evidence. It is insisted on behalf of the state that the draft was properly admitted in evidence, for the reason that defendant, as a partner, had an interest in the Boyer Valley Bank, and in any deposit which may have been to its credit in the Citizens' Bank of Council Bluffs. That will be presumed to be true; but he was neither the owner of the Boyer Valley Bank, nor of deposits to its credit. The indictment charges that he represented he had in the Citizens' Bank a deposit subject to draft, and that the draft he delivered to Bostwick was drawn against it. The one introduced in evidence

The State v. Schultz.

was not his individual draft, nor did it purport to be drawn on his account. The Citizens' Bank would not have been authorized to pay it from funds of defendant, had they been on deposit, for it did not so direct. The indictment does not describe the draft introduced in evidence. It does not seek to charge defendant for false pretenses made on behalf of another. It does not inform him that the alleged false pretenses were made in regard to partnership matters. The fact that he may be liable on the draft as a partner of the firm which drew it does not make it his draft, within the meaning of the indictment. It is proper to state, in this connection, that the only representation in fact made by defendant when the draft was delivered was that included in the draft itself, and the act of drawing and delivering it. Bostwick states that defendant said nothing to him at that time with reference to having money on deposit on which the draft was drawn, and that the draft would be paid when presented, other than the fact that it was given to him. We are of the opinion that the draft should not have been admitted in evidence.

V. The admissibility of the draft involved a controlling question in the case, which was raised in different forms during the trial in the court below. What we have said disposes of all questions which it is necessary to determine on this appeal. The judgment of the district court is

REVERSED.

THE STATE V. SCHULTZ *et al.*

Liquor Nuisance: EVIDENCE: PAYMENT OF UNITED STATES TAX.

Laws of 1886, chapter 118, section 1 (McClain's Ann. Code, sec. 2400) provides that the fact of having paid the United States special tax for the sale of intoxicating liquors is evidence that the persons so paying were engaged in keeping and selling such liquors. And in this case, where defendants were charged with keeping a liquor nuisance, and it was shown that they sold a liquor called "B. B.," and the evidence was conflicting as to whether it was intoxicating,

The State v. Schultz.

but defendants admitted the payment of the United States tax to protect them in the sale of that liquor. *held* that the evidence was sufficient to warrant a decree against them, enjoining and abating the nuisance, and adjudging them to pay the costs, including an attorney's fee.

Appeal from Cass District Court.—HON. C. F. LOOFBOUROW, Judge.

FILED, FEBRUARY 8, 1890.

ON September 27, 1886, the petition was filed, charging that defendants were engaged in the business of keeping intoxicating liquors with intent to sell the same within the state, in violation of law, upon the premises described, thereby causing and continuing a nuisance; and asking a temporary writ of injunction, and, on final hearing, that defendants be perpetually enjoined from carrying on said nuisance, that the same be abated, and for judgment for costs, including attorney's fees. A temporary writ was granted, and afterwards, on December 3, 1886, the defendants answered denying that they were on the first of September, 1886, or at any time during the year 1886, engaged in the sale of intoxicating liquors, or were maintaining a nuisance on the premises described; and averring that they had, long prior to the commencement of this action, in good faith quit the business of selling intoxicating liquors, or keeping the same for sale, in violation of the law. At the May term, 1888, the cause was submitted, and on May eighteenth a decree entered making the temporary injunction perpetual, with judgment for costs, including seventy-five dollars attorney's fees, against the defendants, from which the defendants appeal.

L. L. De Lano and Walker & Crosthwait, for appellants.

John Y. Stone, Attorney General, and *John W. Scott*, for appellee.

GIVEN, J.—The only question discussed is as to the sufficiency of the evidence to warrant a decree against the defendants. It appears from the testimony that the defendants owned the premises described up to the time this case was tried; that they used the property as a public hotel or boarding-house, and also as a saloon, one of the rooms being fitted up with a bar or counter, shelving, etc., as beer saloons are usually furnished. It is not questioned but that they carried on the business of keeping for sale and selling beer in that saloon up to November, 1885. Appellants contend that they then gave up the business of selling beer or other intoxicating liquors, and that since that date they have only kept and sold non-intoxicating drinks. It appears that the defendants paid the special tax, under the United States revenue laws, upon the business of selling distilled, malt and fermented liquors, for the years ending May 1, 1886, and May 1, 1887. Among the beverages which defendants have continued to keep and sell in the saloon were cider, and an article called "B. B." Witnesses testify that the cider was called "hard" and "soft,"—"new" and "old,"—but it does not appear with certainty that it was in condition to intoxicate. It does not appear what the article "B. B." was. One Snouffer testifies: "I also got B. B., soft cider, they called it. The B. B., or soft cider, that I got at Schultz's saloon was, I suppose, beer. It tasted something like it, and, according to my best judgment, I believe it was." The defendant Schultz, when asked if it was intoxicating, answered: "I don't think it was."

Laws of 1886, chapter 113, section 1 (McClain's Ann. Code, sec. 2400), makes the fact of having paid the United States special tax evidence that the defendants were engaged in keeping and selling intoxicating liquors contrary to the laws of this state. Defendants respond to this evidence by claiming that they paid the special tax to protect themselves in the sale of B. B. The explanation is not satisfactory.

The State v. Schultz.

Defendant Schultz testifies that they paid government tax in 1885, and again in 1886, and that they did so for the purpose of protecting themselves in the sale of this B. B.; that they had only two boxes of it (twenty-four bottles), and did not sell hardly any; that the balance spoiled, and was thrown out, and the bottles returned. Snouffer, who speaks of B. B. as being called "soft cider," testifies to getting this drink while the pool-table was there, which must have been prior to November, 1885, when the table was removed. If this be true, the defendants must have known the qualities of B. B. before they paid the special tax, in 1886; or, if this was not before the pool-table was removed, then it was since the time the defendants claim to have quit keeping intoxicating liquors, and yet Snouffer testifies to getting whiskey at the same time he got B. B. If B. B. was not an intoxicating drink the defendants were under no obligation to pay the United States special tax. They needed no protection for the sale of non-intoxicating beverages. We think the fact that the defendants paid this special tax simply to protect themselves in the sale of B. B. shows that they regarded the article as intoxicating. Their explanation of why the special tax was paid for 1886 rather adds to than takes from the weight of that fact as evidence that they were keeping intoxicating liquors for unlawful sale. Adding to this the testimony of Snouffer and others as to the keeping of hard and soft—old and new—cider, we think the district court was fully warranted in rendering the decree that it did. The beer served by defendant Schultz with other refreshments to his friends, on the occasion of his birthday party, we think is explained, and affords no evidence to sustain this case. The decree of the district court is

AFFIRMED.

THE STATE for the use of CRAWFORD COUNTY v.
COPPOCK *et al.*

1. **Bail-bond : ACTION ON: EVIDENCE.** In an action upon a bail-bond the plaintiff introduced in evidence the information filed before the justice of the peace, the warrant issued thereon, and the return thereof, showing the arrest of the accused, the record of the justice showing an order requiring him to give bail to answer the charge before the district court, and the bail-bond in suit; also the record of the district court, showing a default upon the bond rendered on account of the failure of the accused to appear; but the indictment was not offered in evidence. After the submission of the case, and when defendants and their counsel were absent, the court permitted the indictment to be introduced. *Held—*
- (1) That the adjudication of the default, as shown by the evidence, was binding on the sureties of the bond, though made when they were not present.
 - (2) That that adjudication presumed an indictment to which the accused had failed to respond.
 - (3) That, therefore, the permission given to introduce the indictment under the circumstances named was, at most, error without prejudice.
 - (4) That the other evidence was sufficient to fix defendants' liability on the bond.
2. ———: ———: **PAROL TO VARY TERMS OF.** Where in such case the bond was conditioned, as required by law, for the appearance of the accused at the next term of the district court, the testimony of the defendants, that the justice informed them when they signed the bond that he would not be required to appear until a later term, was properly excluded.

Appeal from Crawford District Court.—HON. J. P.
CONNER, Judge.

FILED, FEBRUARY 8, 1890.

ACTION upon a bail-bond against defendants as sureties thereon for the appearance in the district court of one held to answer for a larceny by a justice of the

The State to use of Crawford Co. v. Coppock.

peace. The bond is substantially in the form required by Code, section 4574. The cause was tried without a jury and judgment rendered for the state. Defendants appeal.

Benj. I. Salinger, for appellants.

No appearance for appellee.

BECK, J.—I. The facts of the case will be stated in connection with the discussion of the questions of law decided. Upon the trial of the case the

1. BAIL-bond:
action on:
evidence.

plaintiff introduced in evidence the information filed before the justice of the peace, the warrant issued thereon, and the return thereof, showing the arrest of the accused, the record of the justice showing an order requiring him to give bail to answer the charge before the district court, and the bail-bond in suit, executed and given in pursuance of this order, and for the appearance of the accused before the district court, there to answer to the charge made in the information, and an undertaking that he would abide the orders and judgments of that court. The record of the district court, showing a default upon the bond rendered on account of the failure of the accused to appear for arraignment, was also introduced in evidence. The indictment was not offered in evidence. Upon this and some other evidence the cause was submitted to the district court for decision. Subsequently, when neither the defendants nor their attorneys were present, the court sustained a motion made by plaintiff's attorney to permit the indictment to be introduced in evidence, which was accordingly done. This ruling, and the refusal of the court to sustain a motion by defendants for judgment in their favor, are complained of as errors. The objections based thereon may appropriately be considered together.

The record of the district court offered in evidence, showing a default for failure of the accused to appear for arraignment, contains an adjudication of the court

The State to use of Crawford Co. v. Coppock.

binding upon defendants, for it was entered in a proceeding to which they were parties as sureties on the bail-bond. The law provides for such proceedings, in order to fix the liability of the sureties, by an adjudication that there has been a breach of the conditions of the bond. The sureties, upon executing the bond, assented that their liability should be determined in the manner prescribed by the law.

The adjudication of the default, being had in a proceeding of which the district court had jurisdiction, will be presumed regular until the contrary be shown, and will be regarded as valid and binding until it is shown to have been made without jurisdiction. The default could not have been lawfully entered if no indictment had been found. It must be presumed that the district court found that there was an indictment pending in the case. Its record of default could not have been lawfully made if there had been no indictment. The presumption always to be exercised in support of proceedings of the court required the court below to hold that the order for the default was made upon proper showing of the pendency of an indictment.

II. We need not inquire whether the motion by plaintiff for leave to submit additional evidence was made in time, or whether for any reason the court erred in permitting the indictment to be introduced in evidence after the case was finally submitted, for the reason that if the court erred in this regard it was error without prejudice, for without the indictment the evidence was sufficient to authorize the judgment rendered by the court below. The evidence before the court authorizing the judgment against defendants, the motion for judgment in their favor was rightly overruled.

III. The defendants pleaded as a defense in their answer that the committing magistrate, at the time the bail-bond was given, informed defendants

2. —: —: that the accused was held to appear at a
parol to vary term of.
terms of.

term of the district court subsequent to the term at which the default was taken. The part of

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the answer presenting this defense, upon motion of plaintiff's attorney, was stricken out. This action is complained of, and made a ground of objection to the judgment of the district court. The bond obligates the accused to appear at the "next" term of the district court. The defense was that by the declaration of the justice the term for appearance was later. But parol evidence cannot thus alter the terms of the contract of defendants as expressed in the bond. The law fixes the time of the appearance of the accused. To the law, and not to the committing magistrate, should the defendants have looked for information as to the terms of their obligation, as expressed in the bail-bond.

These considerations dispose of all questions in the case discussed by counsel. The judgment of the court below must be

AFFIRMED.

THE DES MOINES INSURANCE CO. v. BRILEY *et al.*

1. **Appeal: LESS THAN \$100: CERTIFICATE** Where a cause involving less than one hundred dollars is appealed to this court upon the certificate of the trial judge, the facts upon which the certified questions of law arise must be stated in the certificate, as this court cannot look to the testimony to find such facts. (See opinion for citations.)
2. **———: ———: WHAT CERTIFICATE SHOULD CONTAIN.** In such cases the certificate should contain only a bare statement of the facts and the legal point involved. It is not necessary to set out the testimony or the record further than is required to show that the question certified is involved in the case. (See opinion for citations.)

Appeal from Polk District Court.—HON. MARCUS KAVANAGH, JR., Judge.

FILED, FEBRUARY 8, 1890.

GEORGE A. Smith was attorney for plaintiff in its suit against Briley, in which an attorney's fee was entered for \$2.05. Briley was insolvent, and the judgment is unpaid. Smith filed his motion to have the fee

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taxed against plaintiff, which motion was resisted by plaintiff, on the ground that the services as attorney were rendered while Smith was in the employ of plaintiff on a stated salary, which employment included the services rendered in the suit. These are the essential facts, as we understand them. They are not thus understood by the parties. The motion was refused by the district court, and from its judgment Smith appeals.

R. W. Barger, for appellant.

Cole, Mc Vey & Clark, for appellee.

GRANGER, J.—The facts above stated are gathered from the certificate of the trial judge, made to present to this court a question of law for its determination. If the facts are as above stated, they ought to involve no doubtful question of law. The concluding statement of fact above is not found, in terms, by the district court, but it is our inference from other statements of fact found by it; and from the fact that the court has attached to his certificate an exhibit, and referred us to it,—being the testimony in the case,—we understand that it is expected that we will look to the testimony to satisfy ourselves as to the doubtful question. This we cannot do. Without the facts specifically found, no question of law arises. This point has been, in substance, ruled many times. *Hudson v. Railway Co.*, 59 Iowa, 582; *Riddle v. Fletcher*, 72 Iowa, 455; *Chilton v. Railway Co.*, 72 Iowa, 690; *Wineland v. Jones*, 77 Iowa, 401.

The certificate in this case, with an exhibit attached, covers nearly three closely printed pages, besides the testimony referred to, when ten lines would be amply sufficient to present the question, as we understand it. The certificate recites the substance of the testimony of different witnesses, and different proceedings on the hearing of the motion. These matters are all unimportant. The bare statement of facts and the legal point involved is all that is

1. APPEAL : less
than \$100 :
certificate.

2. —: —:
what certifi-
cate should
contain.

Newcomb v. Montgomery Co.

required. In such cases it is not necessary to set out the testimony or the record of the proceeding below, further than is necessary to show that the question certified is involved in the case. For rulings on this question, see *Bennett v. Parker*; 67 Iowa, 451; *McLenon v. Railway Co.*, 69 Iowa, 320, and many other cases. The appeal must be

DISMISSED.

NEWCOMB V. MONTGOMERY COUNTY.

79	487
112	502

Bridges: DEFECTIVE APPROACHES: LIABILITY OF COUNTY: INSTRUCTIONS. In an action against a county for personal injuries received upon an approach to a bridge, and caused by alleged negligence in its construction, it is for the jury to determine not only whether the accident occurred upon the approach to the bridge, but also whether the approach in question was a part of the bridge, or only a part of the highway leading thereto; and an instruction given in this case (see opinion) which submitted the first question to the jury is *held* to be erroneous, because it did not submit the second one also. (Compare *Moreland v. Mitchell County*, 40 Iowa, 394, and *Nims v. Boone County*, 66 Iowa, 272, and 68 Iowa, 642.)

Appeal from Fremont District Court.—HON. H. E. DEEMER, Judge.

FILED, FEBRUARY 8, 1890.

ACTION to recover for personal injuries sustained by plaintiff by reason of the negligent construction of the approach to a county bridge. There was a verdict and judgment for plaintiff. Defendant appeals.

R. W. Beeson, for appellant.

S. McPherson and *J. M. Junkin*, for appellee.

BECK, J.—I. The petition alleges that defendant erected a bridge over the Nishnabotna river, having an approach of earth and stone, of the height of thirty feet, which was by defendant negligently constructed,

in that no barriers, railings or guards were built to protect travelers and horses from falling over the wall. It is averred that plaintiff, in attempting to drive a gig or cart in which she was riding, drawn by one horse, was thrown over the wall of the approach by reason of the horse jumping, from fright, over it. The negligence charged against defendant consists in its failure to cause proper protection against horses and teams jumping off the approach. The defendant denied in its answer all of the allegations of the petition. It is admitted that the bridge in question is a county bridge, and that plaintiff presented her claim for damages for allowance to the board of supervisors of defendant, and it was rejected.

II. The questions in the case arise upon objections to the third instruction given by the court to the jury. This instruction presents fully the facts of the case to which the rules it announces that are objected to by defendant are applicable. It is necessary to set it out in full to expose the error which we find in it.

“3. The statutes of our state impose upon the counties therein the duty, through its board of supervisors, of erecting, maintaining and keeping in reasonably safe condition for travel all bridges, when large enough to be called ‘county bridges,’ within the county, and their obligation extends not only to the bridges proper, but also to the abutments and approaches which make the bridge accessible; and, it being conceded that the bridge in question is a county bridge, the first question of fact, then, to be determined by you, is, was the place where the accident occurred an approach to said bridge? A bridge would be useless as a passage-way for horses and vehicles over a stream unless it be provided, when necessary, at each end, with approaches and abutments necessary to make the bridge accessible on account of the height of the bridge, or for any other reason, and the county undertakes to provide them. The same obligation rests upon it to make them reasonably safe to travel over and along as rests upon it to

Newcomb v. Montgomery Co.

make and maintain the bridge itself. Now, it appears from the evidence in this case, and without apparent conflict, that the west end of the bridge in question was built up to a point on the west bank of the stream, and upon which point the surface of the ground was on about the same level as the floor of the bridge, thus making it unnecessary to construct any artificial approach to that end of the bridge by way of filling or building up to it; and it also appears that after the bridge was built the banks of the river on either side of the bridge, by reason of the action of the water or otherwise, receded from where they were at the time the bridge was built, and that to keep the banks of the river, over which the traveling public reached the bridge, from crumbling and washing away, the county undertook to, and did, erect a stone wall, in connection with a new pier, to the bridge, running northwest and southwest from the said pier along the bank of the river. And the question for you to determine here is whether or not this part of the bank which was connected with the west end of the bridge constitutes an 'approach,' within the proper meaning of that term, and, if it does, how far out from the bridge does this approach extend? and did the accident in question happen upon said approach, or beyond it? And upon this point you are instructed that if the county built out from the west pier of this bridge walls of stone along the highway, and near the outer limits thereof, for the purpose of protecting or holding up the bank over which it was expected the travel would go to and from the west end of this bridge, the part of such passage-way so included in such walls, and in the highway leading to the bridge, would in law be regarded as an approach; and when the county undertook to construct any artificial work in the highway, and in connection with this bridge, the obligation rested upon it to construct such work with reasonable skill and proper care for the safety of the traveling public. And if the accident in question occurred at a point where the county had constructed

any artificial work or wall in the limits of the highway, in connection with this bridge, and was the result of negligence of the defendant, such as is charged in the petition, in constructing such work, the defendant will be liable for the injury sustained by plaintiff on account thereof, if you also find that the accident happened without the fault or negligence of the plaintiff. But if said bridge was built up to the west bank of the stream, and the banks and highways were left in their natural condition, without any artificial work upon them by the county, and as thus left they constitute an approach to the bridge, the county would not be liable for any accident that might happen on said highway or natural approach. Or, should you find that the accident occurred at a place in the highway which would not, under the instructions before given you, be considered a part of the approach to said bridge, then defendant would not be liable."

III. An objection urged by defendant's counsel to this instruction is that it in effect directs the jury that the bank of the river after the construction of the wall was an approach to the bridge, and a part of it. Under the rules recognized by this court, the jury were charged with the duty of determining whether the *locus* of the accident was upon an approach constituting a part of the bridge. Whether the approach be or be not a part of the bridge is not a question of law, for the court, but of fact, for the jury. *Moreland v. Mitchell County*, 40 Iowa, 394; *Nims v. Boone County*, 66 Iowa, 272; 68 Iowa, 642. The third paragraph of the instruction plainly directs the jury to find whether the *locus* of the accident was or was not upon the approach to the bridge, but it nowhere directs the jury to find whether the approach constituted a part of the bridge. It is very plain that one approach may not constitute a part of the bridge, while another approach is to be regarded as a part of the structure. An approach having the character of a highway, rather than of a structure to aid approach to the bridge, cannot be regarded as a part of

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the bridge. It was the duty of the jury to determine, not only whether the *locus* of the accident was upon the approach, but also whether the approach was a part of the highway. This issue was not submitted to the jury. They could well have found that the accident happened upon the approach to the bridge, but it would not follow therefrom that the approach is a part of the bridge. The distinction between an approach having the character of a highway, or of an independent structure and embankment, wall, or other structure intended alone for an approach to the bridge, is obvious. It is not made in the instruction, which is therefore erroneous. For the error pointed out, the judgment of the district court is

REVERSED.

KITE V. KITE *et al.*

Homesteads: DESCENT: EXEMPTION FROM DEBTS OF HEIRS. Where an owner of land, including his homestead, dies, leaving a widow and heirs, and an action is brought to partition the land, and actual partition cannot be made, but it is sold and the proceeds divided, the widow is entitled to one-third of the whole, and judgment creditors of the heirs have no right, upon intervention, to demand that the widow's share be paid exclusively out of the proceeds of the homestead, and the interests of the heirs in the proceeds of the homestead are exempt from liability for their debts contracted prior to the death of their father. (See Code, sec. 2008.)

Appeal from Wapello District Court.—HON. CHARLES D. LEGGETT, Judge.

FILED, FEBRUARY 8, 1890.

PLAINTIFF commenced this action in equity for the partition of real estate in which intervenors claim an interest. The court found that a partition of the premises was not practicable, and ordered them sold, but

79	491
91	274
79	491
95	700
395	704
79	491
115	78
79	491
121	848
1121	850
79	491
1125	58

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decided in effect that intervenors had no interest in a portion of the premises involved in the proceedings known as the "homestead." The intervenors appeal.

W. S. Coen, for appellants.

No appearance for appellee.

• ROBINSON, J.—The pleadings show the following facts: John Kite died intestate in the year 1885, seized of one hundred and twenty acres of land described in the petition, and of other real estate not specified. The defendant, Mary J. Kite, is the widow, and the other defendants and plaintiff are the heirs, of decedent. On the twenty-eighth day of August, 1886, the intervenors recovered a judgment against the plaintiff, A. L. Kite, and the defendants, Charles H. and William Kite, for the sum of \$1,532.19 and costs, upon a note made before the death of John Kite. By their petition of intervention the intervenors allege that their judgment is a lien upon the interests of said judgment defendants, and ask that the referees to be appointed be ordered to pay to the clerk of the district court, to be applied on said judgment, any amount which may be due the judgment debtors from the proceeds of their interests. To the petition of intervention the widow filed her answer, alleging that she was the widow of decedent, and as such claims one-third of all the land involved in the proceeding. At the same time the judgment debtors filed their answer to intervenors' petition, in which they alleged that forty acres of the land in question, which is described, constituted the homestead of their father, the decedent, and as such it was exempt from liability for the payment of their father's debts, and is exempt from liability for the payment of their debts. They deny the alleged right of intervenor to the proceeds of a sale of their interests. To these answers the intervenors demurred. Afterwards, and before a ruling was made on the demurrer, the court, by agreement of all the parties, rendered a decree to

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the effect that the land involved in the controversy could not be partitioned, and ordering a sale of all the land excepting the homestead. The rights of intervenors were to be thereafter determined. After that decree was rendered, the demurrer was overruled, and it was ordered that the proceeds of the sale of the homestead should be exempt from liability for intervenors' judgment. An order for the sale of the homestead, and the distribution of the proceeds thereof, was afterwards made. Appellants complain of the decision of the court, which exempted the judgment debtors' interest in the homestead from the payment of their judgment.

I. Sections 2007 and 2008 of the Code are as follows: "Sec. 2007. Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law. Sec. 2008. The setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is contemplated in the preceding section, but the survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased. But if there be no such survivor the homestead descends to the issue of either husband or wife, according to the rules of descent, unless otherwise directed by will, and is to be held by such issue exempt from any antecedent debt of their parents or their own." "Upon the death of the party owning the homestead, it descends to the heirs subject to the right of occupancy of the surviving spouse." *Johnson v. Gaylord*, 41 Iowa, 366. See, also, cases therein cited. The heirs hold the property free from the debts of the ancestor which, in his lifetime, could not have been enforced against it. *Moninger v. Ramsey*, 48 Iowa, 368. They also hold it exempt from their own debts contracted prior to the death of the ancestor, and they so hold it even though they do not take possession of and occupy it. *Baker v. Jamison*, 73 Iowa, 699; *Johnson v.*

Gaylord, supra. Section 2441 of the Code is as follows: "The distributive share of the widow shall be so set off as to include the ordinary dwelling house given by law to the homestead, or so much thereof as will be equal to the share allotted to her by the last section, unless she prefers a different arrangement. But no different arrangement shall be permitted where it would have the effect of prejudicing the rights of creditors." It seems to be the claim of appellants that this section requires that the widow's share include the homestead, where creditors of the heirs of the decedent would be prejudiced by a different arrangement. In this case, if the widow is compelled to take the homestead, the interest of the judgment debtors in the property of decedent, which may be subjected to the payment of their debt, will be larger than it will if a different arrangement is permitted. It was said in *Mock v. Watson*, 41 Iowa, 246, that section 2441 "simply forbids the widow receiving a greater interest in the real estate than that prescribed by law, namely, one-third in value of all the lands." The property involved in this case is in the condition contemplated by section 2451 of the Code. It cannot be divided, and must be sold. The widow is entitled to one-third of the proceeds of the whole, and creditors of the heirs of the decedent have no rights in his estate which entitle them to require the widow's share to be paid exclusively from the proceeds of the homestead. It is the policy of the law to exempt the homestead from judicial sale while occupied by the surviving husband or wife, and in the hands of the heirs. *Johnson v. Gaylord, supra.* It has been held that the proceeds of a homestead are liable for the debts of the surviving husband (*Huskins v. Hanlon*, 72 Iowa, 37), but the rights of the survivor and of the heirs to the homestead are in some respects materially different. It is exempt to the survivor while it remains his homestead, and he may sell and use the proceeds of his interest therein to procure another homestead which will be exempt from debts for which the first would not

 Robinson v. The Chicago, R. I. & P. Ry. Co.

have been liable. But he may abandon it, and thereby render his interest subject to the payment of his debts. The interests of the heirs, however, are exempt from liability for their debts, not because of any homestead right they have in the premises, but because of the homestead right of their ancestor. We conclude that the district court was right in overruling the demurrer of intervenor.

AFFIRMED.

79	495
80	494

ROBINSON V. THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY.

Railroads: DUTY TO KEEP CATTLE-GUARDS FREE FROM SNOW AND ICE.

A railroad company is required to use ordinary diligence to keep its cattle-guards free from snow and ice, after it has had notice, or could have acquired notice in the exercise of ordinary care, that they are obstructed thereby. (*Grahman v. Railway Co.*, 78 Iowa, 564, followed.)

Appeal from Jasper District Court.—HON. W. R.
LEWIS, Judge.

FILED, FEBRUARY 8, 1890.

ACTION to recover the value of a horse killed by an engine operated upon defendant's road, through the negligence of defendant in permitting a cattle-guard to be filled with snow and ice, which enabled the horse to go upon the railroad track, where it was killed. The cause was tried to a jury, and a verdict was rendered for defendant under an instruction requiring such a finding. Plaintiff appeals.

E. J. Salmon and *A. Clark*, for appellant.

Thos. S. Wright and *Winslow & Varnum*, for appellee.

BECK, J.—I. The facts upon which the questions of law involved in this case arise are not disputed. The plaintiff's horse went on defendant's railroad track,

Robinson v. The Chicago, R. I. & P. Ry. Co.

whereon it was killed, over a cattle-guard which was filled with snow and ice, enabling the animal to cross it. The abstract shows offers to introduce evidence, in the following language: "Plaintiff offered to prove that the guard upon defendant's road, at which the accident is claimed to have happened, was filled from Saturday with snow and ice; that on Saturday it became hard and full to the top of the ties on which are fastened the rails of the road, and remained in that condition Saturday night, Sunday, Monday, Tuesday and Wednesday, and upon Wednesday night, in the night-time, or early in the morning of Thursday, the horse belonging to plaintiff, and for which action is brought, crossed such guard, and without fault or negligence upon the part of plaintiff, on the snow and ice thus allowed in the cattle-guard, rendering such guard of no use or utility as a barrier to in any way prevent or retard the passage of stock over the same; that the fact of said guard being completely filled with snow and ice was known by the section foreman in the employ of defendant, upon the days of Sunday, Monday, Tuesday and Wednesday preceding the injury, and that no effort or attempt of the railway company was made to remove the snow and ice accumulated therein; that said snow and ice in said guard on the days of Sunday, Monday, Tuesday and Wednesday was sufficiently hard to enable stock to pass upon and over the same without obstruction." The plaintiff further offered to prove, by a section foreman and a section agent, that the rules of the company, at the time, required the section foreman to keep the cattle-guards free from snow and ice, and that it was his duty to so keep them. All this evidence, upon objections of defendant, based upon the ground that it was irrelevant and incompetent, was rejected. Plaintiff introduced evidence tending to prove that the horse was killed without the fault of plaintiff; upon the track of defendant's railroad upon which it went over the cattle-guard, which at the time was filled with ice and snow. The plaintiff announced that he based

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his claim to recover upon the negligence of defendant in failing to keep the cattle-guard free from snow and ice, and in failing to attempt to do so; that he claimed defendant was negligent in no other regard. The plaintiff having rested his case, the district court directed the jury to return a verdict for defendant.

II. The ruling of the court below is to the effect that defendant is not required to keep its cattle-guards free from snow and ice, and therefore is not required to make any effort to do so, and that a failure in this regard is not negligence. But this court has recently held that a railroad company is required to use ordinary care and diligence to keep the cattle-guards on its track free from snow and ice, after it has notice, or could have acquired notice, in the exercise of ordinary care, that they were obstructed thereby. The company, after such notice, has a reasonable time and opportunity to remove the snow and ice from the cattle-guards. *Grahlman v. Railway Co.*, 78 Iowa, 564. Following the decision in that case, the judgment of the district court is

REVERSED.

79	497
84	732
79	497
88	5

THE DES MOINES SAVINGS BANK V. THE COLFAX
HOTEL COMPANY *et al.*

Promissory Note : JUDGMENT : ASSIGNMENT TO INDORSER : SATISFACTION. Defendant executed its note to C., who indorsed it to plaintiff. Plaintiff brought action upon the note and took the default of both defendant and C., but took judgment against defendant only. C. furnished A. with sufficient money to procure an assignment of the judgment to A., but A. held it for C. only, and, in legal effect, C. paid the money and took the assignment to himself. *Held* that the judgment was not thereby satisfied, as C. was not a judgment debtor. (See opinion for cases distinguished.)

Appeal from Polk District Court.—HON. JOSIAH
GIVEN, Judge.

FILED, FEBRUARY 10, 1890.

IN 1885 the plaintiff recovered a judgment against the Colfax Hotel Company for three thousand dollars, on a note executed by the hotel company to James Callanan, and by Callanan transferred by indorsement to plaintiff. In the action upon this note Callanan was made a party, default taken, but no judgment was ever rendered against him. After the entry of the judgment against the hotel company, Callanan furnished to one Atkins sufficient money, and the latter took an assignment of the judgment to himself. The assignment was never filed, and the records do not show any transfer of the judgment. Callanan took Atkins' note for the amount of money furnished to purchase the judgment. Upon this judgment an execution was issued, and Clark was garnished. He answered as such garnishee in February, 1888, denying that he was in any manner indebted to the defendant, and alleging no other reason why he was not liable. Issue was joined upon this answer, and a trial had to the court, which found the following fact: "That the judgment under which the execution upon this garnishment was served was satisfied by the payment of the money by James Callanan, as shown in the evidence, and the court makes no finding as to whether the said garnishee is indebted to the defendant, nor upon any other question presented in the case." The district court entered judgment discharging the garnishee, from which the plaintiff appeals.

Cummins & Wright, for appellant.

C. C. & C. L. Nourse, for appellee.

GRANGER, J.—It will be observed that the order discharging the garnishee is based on the court's finding that the judgment in the case had been paid by Callanan, and no other fact in the case is found. Of course, if the principal judgment was paid, there was no basis for the garnishment proceeding, and the

Des Moines Sav. Bank v. The Colfax Hotel Co.

discharge was right. We should first understand the full force or effect of the finding of fact by the court. It "finds that the judgment * * * was satisfied by the payment of the money by James Callanan, as shown in the evidence." Turning to the evidence, we think it admits of but a single conclusion,—that Atkins, in paying the money and taking the assignment, acted for Callanan, and that the judgment, if not as a matter of law satisfied, is the property of Callanan. The testimony of Mr. Callanan admits of no other conclusion. If it were a matter of practical dispute, we could not in this case determine it from the evidence.

We then have the facts so modified in legal effect as to show that Callanan paid the money, and took an assignment of the judgment to himself. This brings us clearly to the question, if such an act was a satisfaction of the judgment. The facts upon which an affirmative answer must rest are that Callanan, as payee in the note, indorsed the same to the plaintiff, and was in the suit made a party, and was at the time of the assignment standing in default, but with no judgment against him. *Schleissman v. Kallenberg*, 72 Iowa, 338, involved the question of the right of one of two judgment defendants, whose liability was that of indorser on a note, to purchase the judgment against his co-defendant, and the right is there sustained. In that case, however, the indorser was not a payee in the note, and the opinion seems to attach importance to that fact, though it is by no means the controlling consideration. The thought upon which the ruling must rest, is that the assignee of the judgment, though a party to it, being a surety only as to his co-defendant, was not liable for its payment. His liability was alone to the judgment plaintiff. As to his co-defendant, if he paid the judgment he must be reimbursed, and there seems to be no good reason or direct authority why he should not pay the judgment, and take an assignment of the same against his co-defendant, whose obligation for payment was primary. On account of some expressions used in the

reasoning, each party cites and claims support from the case. Appellee insists that it is an express holding in support of his claim that the judgment in this case was satisfied. Without attempting to determine the merits of the respective claims as to that case, it is sufficient to say that this case is not the same as to its facts, in this: That in this case Callanan is not a judgment debtor, and not liable as such. His liability is still on the note, and we are unable to see why he may not, in the relation he occupies, purchase of the plaintiff the judgment, and hold it against the other defendant in the case. It is said to so hold is to overturn the adjudications in *Bones v. Aiken*, 35 Iowa, 534; *Drefahl v. Tuttle*, 42 Iowa, 177; and *Johnston v. Belden*, 49 Iowa, 301. But those are cases in which a judgment debtor paid the judgment, and took an assignment against other judgment debtors whose liabilities were primary; and the holdings were that the payment was a satisfaction of the judgment. To hold that the payment by Callanan was a satisfaction of the judgment in this case, we must extend the rule, and have it apply to cases of defendants without judgment. Before so doing, the rule as it exists should possess merits that we do not discover. Callanan assigned the note on which the judgment was obtained to the plaintiff. By such assignment the hotel company became obligated for its payment to the plaintiff, and Callanan's obligation was secondary.

It was the right of Callanan thereafter to purchase the note of the plaintiff, and hold it as against the defendant company. Such a purchase would not be treated as a payment of the note. As long as Callanan is not a judgment debtor, why may he not, on principle, purchase a judgment obtained against the maker on the note, and hold it in lieu of the note? No reason is suggested, barring the claim that the authorities cited are against it, and we can imagine none. Under the facts as disclosed in the records, if Callanan should pay the judgment the law gives him the right to recover

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the amount so paid from his co-defendants. No interest is to be subserved by compelling Callanan to institute another suit, involving expense and time, to obtain a judgment, and public policy certainly does not dictate such a course. We do not think the transaction by which Callanan paid the judgment and took an assignment operated as a satisfaction of the judgment, and in so holding we think the district court erred.

Appellee presents other questions for consideration in support of the court's action, but, as we understand, they do not arise in the record. The court's judgment was based on one fact found. Appellee does not appeal, and the assignments of error do not involve the points presented by appellee. The court, after finding the one fact, expressly states that it "makes no finding as to whether the said garnishee is indebted to the defendant, nor upon any other question presented in the case." The plaintiff is entitled to a finding as to the indebtedness of the garnishee, and in a law action, where the testimony is conflicting, we cannot consider it for that purpose. The cause is remanded to the district court for such a finding

REVERSED.

SANBORN & FOLLETT V. MAGEE.

Mortgages: MERGER: APPLICATION OF PAYMENTS. Plaintiffs held the note of G., which was secured by a chattel mortgage, and also by a mortgage on four hundred acres of land. G. sold nine hundred and twenty acres of land, including the four hundred acres, to his sons, who assumed a large amount of mortgage indebtedness thereon, including the debt to plaintiffs. Afterwards the sons, by a deed absolute on its face, but which, with collateral agreements, was a mortgage in effect, conveyed seven hundred and sixty acres of the land to plaintiffs, who agreed to pay all the mortgages on the land conveyed to them, and a certain judgment, and all taxes, and to hold G. "harmless from the payment of the same." The sons had the right to sell any of the land on terms satisfactory to plaintiffs, and were in such case to account for the proceeds. They also had the right to occupy the land for three

Sanborn & Follett v. Magee.

years, keeping up improvements, and paying interest and taxes. They also had the right to redeem upon certain stated terms. Plaintiffs afterwards sold some of the chattels included in their mortgage first above named, and applied the most of the proceeds in paying interest on mortgages assumed by them in the transaction with the sons. They also sold a portion of the land, taking therefor notes not yet paid. *Held—*

- (1) That judgment creditors of G. could not complain if he consented to the use made by plaintiffs of the proceeds of the chattels sold, and that they could not demand that the proceeds of the land sold should be applied upon the payment of the note which plaintiffs held against him.
- (2) That the taking of the title to the land from the sons did not operate to merge their mortgage and the debt secured thereby in the title, and so work a satisfaction also of the chattel mortgage, so as to subject the remaining chattels to liability for other debts owing by G.

Appeal from Woodbury District Court.—HON. CHARLES H. LEWIS, Judge.

FILED, FEBRUARY 10, 1890.

ACTION to recover the possession of specific personal property, and damages for its detention. There was a trial by the court, and a judgment in favor of plaintiffs for the property and costs. The defendant appeals.

J. H. & C. M. Swan and W. D. Buckley, for appellant.

J. P. Blood, for appellees.

ROBINSON, J.—On the twenty-sixth day of July, 1886, one Joseph Gravel made to Chapin Bros. his two promissory notes, of which one was for \$1,519.40, payable September 26, 1886, and the other was for \$3,652.20, payable January 26, 1887. At the same time, to secure their payment, he executed a chattel mortgage on eighty-four steers four years old, and fifty steers three years old. On the ninth day of November, 1886, Joseph Gravel, to further secure the payment of

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said notes, executed a chattel mortgage on two stallions, of which one is the property in controversy in this action, two geldings, and seventeen colts, and also a mortgage on four hundred acres of land. The note first described has been paid. On the twenty-eighth day of January, 1887, the sum of sixty-seven dollars was paid on the other note, and on the eighth day of the next month all interest due to that date, and \$877.20 of the principal, were paid; and the note and securities were then sold and transferred to plaintiffs by Chapin Bros. At that time all but about ten of the mortgaged steers had been sold. On the fourteenth day of January, 1887, Joseph Gravel conveyed to his sons, A. J. Gravel and A. L. Gravel, about nine hundred and twenty-six acres of land subject to mortgages thereon amounting to twelve thousand, five hundred dollars, which the grantees assumed and agreed to pay. On the thirteenth day of March, 1887, said grantees conveyed to Judson L. Follett seven hundred and sixty acres of the land received of their father as aforesaid. It was provided by a separate agreement in writing that Follett assumed and should pay all the mortgages on the premises conveyed to him, a judgment which was specified, and all taxes, and hold Joseph Gravel and his wife "harmless from the payment of the same." The agreement further provided that A. J. and A. L. Gravel might sell any or all of the premises on terms satisfactory to Follett, and turn over to him the proceeds; that they might use and occupy said premises for three years from March 1, 1887, in consideration of which they were to keep the improvements in good condition at their own expense, and pay all interest to become due on the debts secured by the mortgages on the premises, and pay all taxes which should be levied thereon. It was further provided that said A. J. and A. L. Gravel might redeem any portion of said premises, in tracts of not less than eighty acres each, by making certain payments on terms specified; such redemption to be made "by paying the proportionate amount that

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the said tract stands as security for the sums that the said Follett has become responsible for, together with the sums that he may have been required to pay for any other cause to protect all of said premises." In ascertaining the amount to be paid in redemption, it was provided that Follett should receive the sums paid out "as principal, interest, taxes, costs and all other sums as expenses that he may have been required to pay to protect or improve said premises, with ten per cent. interest on the whole from date of each payment." The conveyance to Follett, and the agreement signed by him, were in fact made for and in behalf of the copartnership of Sanborn & Follett, plaintiffs, of which he is a member. On the twenty-eighth day of June, 1887, plaintiffs received two hundred and ten dollars, the most of which came from the sale of the mortgaged steers. Of that amount, sixty-seven dollars was paid on the note purchased by them in January, and the remainder was used in paying interest on debts secured by mortgages, the payment of which had been assumed by Follett's agreement. On the twenty-second day of October, 1888, plaintiffs sold one hundred and sixty acres of the land included in the mortgage to Chapin Bros. for the sum of fifty hundred and twenty dollars in notes, which have not yet been paid. The incumbrance on the land so sold was to be paid by plaintiffs, although the transaction was in the name of Follett.

The property in controversy is a black Bashaw stallion of the alleged value of six hundred dollars. It is claimed by plaintiffs by virtue of the chattel mortgage executed by Joseph Gravel to Chapin Bros. on the ninth day of November, 1886, and assigned to plaintiffs. The defendant claims the property as sheriff under an execution against the property of Joseph Gravel, issued on the twenty-fifth day of October, 1888, and levied on the twenty-ninth day of that month, by taking the stallion in question from the possession of Joseph Gravel. It was taken from defendant under the writ of replevin issued in this action. Appellant

Sanborn & Follett v. Magee.

claims that the debt secured by the chattel mortgage to Chapin Bros. was fully paid before his levy was made, by the payment of two hundred and ten dollars in June, 1887, and by the sale of the one hundred and sixty acres of land in 1888; and it may be conceded that the claim is well founded if the sum named, and the proceeds of the sale of the land, should be applied on the mortgage debt. That such application has not been made is admitted. Whether or not Joseph Gravel and his sons consented to the use made of the two hundred and ten dollars, and the proceeds of the land sold, is not shown. Joseph Gravel could have required the proceeds of the steers to be used in paying his note purchased by plaintiffs, but it was within his power to assent to a different application of the money, and, if he did so, his creditors represented by defendant could not complain.

It is claimed that the effect of the conveyance made by the sons to Follett, and the agreement of the latter to assume and pay the mortgage indebtedness, had the effect to satisfy so much of it as was held by plaintiffs. It is clear, however, that the conveyance to Follett was in the nature of a mortgage, although it provided in terms that it should be treated as absolute. The sons remained in possession of the premises, and had the right to redeem them by paying sums which Follett should advance, and for which he should be responsible with interest. They also had the right to sell them, subject to the approval of Follett. There is evidence which tends to show that the transactions of February and March were separate and distinct, and that it was not the intent of the parties to the March transfer and agreement that the mortgage debt held by plaintiffs should be merged in the title acquired by Follett. On the contrary, it appears that a requirement that such a merger should take effect would have prevented the agreement. It was the desire and for the interest of plaintiffs to retain all the security they had, and all they acquired, to protect the claim they held, and those

 Truman v. Truman.

for which they became responsible. The provisions of the agreement with Follett, which permitted A. J. and A. L. Gravel to redeem the lands by them conveyed, we must presume, were designed for their benefit. Therefore, it appears that there was no purpose to vest in Follett or the plaintiffs an absolute title to the land, and no intent to merge or release securities. In the absence of an agreement of the parties so to do, the law will not apply the proceeds of the sale of the land on plaintiffs' claim against Joseph Gravel. The evidence to support the finding of the district court is ample. Since the mortgage debt was not paid, the mortgaged chattel could not be taken lawfully in the manner attempted in this case. The judgment of the court below is

AFFIRMED.

 TRUMAN v. TRUMAN *et al.*

Specific Performance: PAROL GIFT OF LAND: STATUTE OF FRAUDS: EVIDENCE. Where a party seeks to compel a conveyance of land which he claims to own by virtue of a parol gift, and to take the case out of the statute of frauds upon the ground of part performance, he must establish the gift by clear, unequivocal and definite testimony, and the acts claimed to be done thereunder, and relied on as part performance, should be equally clear and definite, and referable exclusively to the alleged gift. (See *Williamson v. Williamson*, 4 Iowa, 281.)

Appeal from Winneshiek District Court.—HON. CHARLES T. GRANGER, Judge.

FILED, FEBRUARY 10, 1890.

ACTION to enforce specific performance of an alleged gift of a certain tract of land to plaintiff's husband, and that the same be adjudged her homestead. The following facts appear without question: The plaintiff is the wife of defendant Joseph Truman, son of defendant Thomas Truman, whose only other child is Violet Parker. The plaintiff and Joseph were married in

79	506
111	364

79	506
116	518

79	506
133	358

79	506
141	718
142	52

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June, 1881, and thereafter resided together upon the half section of land described until in June, 1885, cultivating and managing the same as a farm; said Joseph Truman disposing of the products as his own. During that time permanent improvements, in the way of buildings and betterments, fencing, plowing, etc., were put upon the half section thus occupied. In June, 1885, plaintiff was taken to her father's house, where she has ever since resided separate and apart from her husband; he having abandoned her and failed to provide for her. On June 5, 1885, Joseph Truman executed a chattel mortgage to his father, Thomas, on all of the property on the farm; and on the thirteenth of June gave his father authority, in writing, to take and dispose of said property. Thomas Truman was the owner of the half section of land described, and held the legal title thereto at and prior to 1881, and continued to hold the same until August, 1885, when he sold the same, together with said personal property, to the defendants L. R. and H. C. Brown, for thirteen thousand, two hundred dollars. The only dwelling on the farm is situated on the southeast quarter of the southeast quarter of the section. Prior to the marriage of the plaintiff and Joseph, the house was occupied by a tenant, who worked a part of the farm, and with whom the defendant Joseph boarded while working the other part. Some time after their marriage, the tenant quit possession, and the plaintiff and her husband occupied the entire premises until June, 1885.

The plaintiff alleges that defendant Thomas, in consideration of love and affection, and that his son, Joseph, would accept and occupy the same, gave and delivered said farm to Joseph in 1881; and Joseph accepted the same as owner, and took possession thereof, in 1881, and continued to occupy it as owner, with the plaintiff, and to cultivate and improve the same as owner thereof, and as their homestead. That in June, 1885, the defendants Thomas and Joseph Truman conspired together to defraud the plaintiff out

Truman v. Truman.

of her marital rights in said premises, to effect which they combined to get the plaintiff off said premises, and induced her to leave the same, and to go to her father's house. That she never gave up her rights of homestead, but was induced to and did go to her father's house, leaving her household goods and other things belonging to her, as a wife, on the premises in question. That the plaintiff and her husband, while occupying said premises, put lasting and valuable improvements thereon, and that her husband has abandoned and left her without means of support. That the sale and conveyance to the Browns was not in good faith, but was made to defraud plaintiff, and that she is still entitled to the possession of the southeast quarter of the southeast quarter aforesaid, as her homestead.

The defendants, answering, denied that Thomas Truman ever gave said farm to his son Joseph, but alleged the fact to be that, in the year 1881, said Thomas, desirous of testing his son's ability and industry to manage a farm successfully, permitted him to occupy the farm in controversy, and furnished him with means of stocking and working the farm, in pursuance of an express agreement between them that Joseph might occupy the farm, and use the means furnished as aforesaid, as long as the defendant Thomas was satisfied with his conduct and management, and that, when Thomas Truman became dissatisfied with his conduct and management, then the possession and license should be revoked, and the means said Thomas had permitted him to use should be returned. That Joseph's occupancy was under said agreement and none other. That in June, 1885, Thomas Truman, becoming uneasy in regard to the conduct and management of said property by his son, demanded and received said chattel mortgage upon all of the stock, tools, machinery and crops on the farm, as security for the amounts originally advanced and subsequently loaned, amounting to thirty-six hundred and seventy-three dollars. That Thomas

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Truman learned that Joseph and his wife had domestic troubles, and that she had left him, and that he would not live with her, and was going to abandon the farm; whereupon Thomas took possession of the farm, as he had a right to under the agreement by which he had permitted his son to occupy the same. That in consideration of Thomas' promise to pay certain debts for Joseph, amounting to seven hundred and eighty dollars, and of the indebtedness secured by said mortgage, Joseph sold and transferred to said Thomas all the property and the crops on the farm. That afterwards, in good faith, said Thomas Truman sold and conveyed said farm, crops, stock and property to the defendants Brown for thirteen thousand, two hundred dollars.

Upon these issues the cause was submitted to the court, and decree entered dismissing plaintiff's bill and for a judgment against her for costs, from which she appeals.

L. Bullis, for appellant.

Willett & Willett and *C. Wellington*, for appellees.

GIVEN, J.—I. The plaintiff asks specific performance of a parol gift of certain lands, described, alleged to have been made by defendant Thomas Truman to the defendant Joseph Truman, his son, and husband of the plaintiff, which Joseph Truman accepted, and upon the faith of which he took and retained possession of said land, and made lasting and valuable improvements thereon. That courts of equity will decree specific performance in such cases is well established. *Moore v. Pierson*, 6 Iowa, 298; *Peters v. Jones*, 35 Iowa, 518. Such cases are among the exceptions to the statutory rule that all contracts relating to real estate must be evidenced by some writing, signed by the party to be charged. The burden of the proof is peculiarly upon the party asking performance. "If a party would take a case out of the statute of frauds upon the ground of part performance, it is indispensable that the parol contract, agreement or gift should

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be established by clear, unequivocal and definite testimony, and the acts claimed to be done thereunder should be equally clear and definite, and referable exclusively to the said contract or gift." *Williamson v. Williamson*, 4 Iowa, 281. We have considered the case without reference to the testimony introduced by defendants as to the declarations of Thomas Truman, to the effect that he had not given the farm to Joseph. In our opinion, the plaintiff has failed to show, with that clearness and certainty which the law requires, that a gift was made, or that the improvements that Joseph placed upon the farm were made upon the faith that the farm was his. The testimony is somewhat voluminous, and it would not serve any good purpose to refer to it at length. It is sufficient to say that all the facts are at least as consistent with the theory that Thomas Truman put his son Joseph on the farm to give him a chance to do well, and to see how he would succeed, as that he had given it to him. There is considerable conflict in the testimony as to how much of the improvements Joseph paid for. It is evident, however, that he neither made nor paid for any that he might not have done for his own convenience as tenant occupying during the will of his father. In our opinion, the decree of the district court should be affirmed. This view of the case renders it unnecessary to notice the other questions presented.

AFFIRMED.

 MATHEWS V. CLAYTON COUNTY.

Justices of the Peace: TRIAL FEES: "TRIAL" DEFINED. "A trial is a judicial examination of the issues in an action, whether they be issues of law or of fact." (Code, sec. 2739.) In criminal cases before a justice of the peace, where no issue of law is raised by demurrer, and the defendant pleads "guilty," thus avoiding any issue of fact, and judgment is rendered upon such plea, there can be no "trial," within the meaning of the statute, and, therefore, in such cases, the justice is not entitled to the trial fee provided by section 3804 of the Code. (*Shaw v. Kendig*, 57 Iowa, 390, distinguished.)

79	510
92	46
79	510
126	580

Mathews v. Clayton Co.

Appeal from Clayton District Court.—HON. L. O. HATCH, Judge.

FILED, FEBRUARY 10, 1890.

PLAINTIFF brings this action to recover from defendant certain fees claimed to be due him as justice of the peace, from the defendant county, for services rendered in certain criminal cases. The case was submitted to the court on an agreed statement of facts, and judgment rendered against the defendant for ninety-six dollars and costs, to which the defendant excepted. The trial judge certifies the question upon which it is desirable to have an opinion of this court as follows:

“This suit is brought by the plaintiff, a justice of the peace, to recover a trial fee of one dollar in each of ninety-six criminal cases disposed of before him as such justice. It is submitted to the court on the following stipulation of facts: In each case there is a plea of guilty, and a judgment on each plea. There was no objection made to the information in any case, by demurrer or otherwise, nor was any evidence introduced in any case; and there was no other trial than is implied in those facts. It is further stipulated that, if these facts entitled the plaintiff to a trial fee under section 3804 of the Code, he is to have judgment for the amount claimed. Judgment for the plaintiff for ninety-six dollars and costs. Defendant excepts. I, L. O. HATCH, the trial judge in this case, certify that this cause involves the determination of the following question of law, upon which it is desirable to have the opinion of the supreme court, to-wit: Under section 3804 of the Code, is a justice of the peace entitled to a trial fee in a criminal cause in which there is a plea of guilty, and judgment thereon, and in which no objection is made to the information, and no evidence introduced, and no trial, unless one is implied in these facts?

“L. O. HATCH, Judge.”

R. Quigley and J. Larkin, for appellant.

W. E. Odell, for appellee.

GIVEN, J.—I. Among the provisions of section 3804, Code, fixing the fees of justices of the peace, is the following: "For trial of all causes, civil or criminal, for each six hours, or fraction thereof, one dollar." Our inquiry is whether the facts certified show a trial, within the meaning of this paragraph. "A trial is a judicial examination of the issues in an action, whether they be issues of law or of fact." Code, sec. 2739. "Issues arise in the pleadings where a fact or conclusion of law is maintained by one party, and controverted by the other. They are of two kinds: (1) Of law; (2) of fact." Code, sec. 2737. In criminal cases "an issue of law arises upon a demurrer to the indictment." "An issue of fact arises on a plea of not guilty, or of former conviction or acquittal of the same offense." Code, secs. 4348, 4349. With these provisions of the Code, we need not look elsewhere for a definition of the term "trial," as used in section 3804. The term "trial," as therein used, means a judicial examination of an issue of law or fact raised by demurrer or plea. There was no issue of law or fact raised by demurrer or plea in the cases in which a trial fee is claimed. After the pleas of guilty, nothing remained for the justice to do but to pronounce judgment. It is true that in such cases he may upon his own motion, or at the request of either party, hear testimony in mitigation or aggravation of punishment; but this would not be a judicial examination of an issue, any more than the calculation of interest due upon a note on which judgment is to be entered. There are many matters incident to a case that the court must consider and pass upon, such as the sufficiency of service and the like, which, taken alone, do not constitute a trial.

If it might be said that hearing testimony in mitigation or aggravation of punishment was a trial, still there was no trial in these cases, for no evidence was introduced. *Shaw v. Kendig*, 57 Iowa, 390, is relied upon.

The State v. Jennings.

In that case it was held that a justice of the peace was entitled to a trial fee, in default cases, where plaintiff's claim was denied by operation of law, and where the plaintiff was required to introduce testimony in support of his claim. The court says: "In such cases the justice is required to try the issue which the law raises as to the amount to which the plaintiff is entitled." That case is readily distinguishable from these. In that, issues of fact were joined, and testimony taken, the same as if defendant had appeared and denied. In these cases there was no issue joined. Our conclusion is that there was no trial in either of the criminal cases referred to, and consequently the plaintiff is not entitled to a trial fee therein. The judgment of the district court is

REVERSED.

THE STATE V. JENNINGS.

1. **Burglary with Intent to Steal: INDICTMENT.** In an indictment for burglary with intent to steal, under section 3894 of the Code, it is not necessary to allege the fact of larceny, and hence not necessary to allege the character, value and ownership of the property intended to be stolen. (Compare *State v. Newberry*, 26 Iowa, 467.)
2. ———: **EVIDENCE: POSSESSION OF STOLEN GOODS.** In a prosecution for burglary with intent to steal, where goods have actually been stolen from the burglarized building, possession of the stolen goods by the defendant soon after the commission of the burglary is evidence from which the jury may find the defendant guilty, but is not *prima-facie* evidence of guilt in such a case, as it is in cases of larceny. (See opinion for explanation of apparently conflicting cases.)

79	513
79	765
79	513
87	36
79	513
94	64
79	513
95	438
79	513
98	61
98	780
79	513
102	655
79	513
108	74
79	513
118	97
79	513
120	39
121	566
123	454

Appeal from Page District Court. — HON. A. B. THORNELL, Judge.

FILED, FEBRUARY 10, 1890.

INDICTMENT for burglary. From a judgment on conviction the defendant appeals

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The State v. Jennings.

Wm. P. Ferguson, for appellant.

John Y. Stone, Attorney General, and *T. R. Stockton*, County Attorney, for the State.

GRANGER, J.—I. The charging part of the indictment is as follows: “That said defendants, on or about the thirty-first day of January, 1889, in said county, did, with force and violence, unlawfully, feloniously and burglariously break and enter a certain store building of one W. N. Maloney, in the town of Essex, Page county, Iowa, in which store-building goods, wares and merchandise were kept for sale, use and deposit by the said W. N. Maloney, with the felonious intent on the part of said Wm. Jennings and Edward Ray then and there to commit a public offense, to-wit, larceny, contrary to and in violation of law.” It is urged that the indictment is fatally defective because it “fails to state the kind or value or ownership of the goods which were the subject of the intended larceny.” The provisions of the statute, under which the indictment was found, is section 3894, and reads: “If any person, with intent to commit any public offense, * * * at any time break and enter * * * any buildings in which any goods, merchandise or valuable things are kept for use, sale or deposit, he shall be punished,” etc. The offense provided in the section is not a larceny, nor is the fact of a larceny necessary to the offense charged. The offense only involves an intent to commit a larceny. The offense charged is as complete if the breaking and entering is done with such intent as if the larceny is actually committed. It is not necessary to prove the fact of the larceny to secure a conviction, and hence the character of the property intended to be stolen, its value and ownership, are not material, and need not be alleged in an indictment for burglary. This view has support in *State v. Newberry*, 26 Iowa, 467.

II. The only other question in the case is as to the sufficiency of the evidence to connect the defendant with the commission of the offense. On the night of

The State v. Jennings.

January 31, 1889, there were taken from the store of W. N. Maloney ten revolvers, twenty-two razors, two hundred and twenty pocket knives, and some cartridges, in all of the value of about one hundred and forty-five dollars. It is unquestioned in the case that the store was on that night burglarized, and the property stolen. We look briefly to the facts tending to connect the defendant with the offense. If defendant is a guilty party, he was evidently in the commission of the offense associated with one Ray. It appears that Ray is quite young, and Jennings larger and older. There are certain facts disclosed by the testimony which may be regarded as established. On the morning after the burglary, Ray sold to one Walker, at Bingham, a few miles from Maloney's store, a new knife. On the night of February 2, two men, answering the description of Jennings and Ray, were discovered by a brakeman at Coin, Iowa, in a freight car, purloining a ride. When asked by the brakeman to "put up something," the older gave him a new pocket knife. This occurred about midnight. Early on the morning of February 3, Jennings and Ray were seen asleep in the coal house at Stanberry, Missouri, and were seen there, off and on, during that day, which was Sunday, and they were together. Both Jennings and Ray were arrested, February 3, on a charge of robbery committed at Gentryville, Missouri, with two other parties. When arrested, Ray had on his person three new knives and a cartridge box. On the box was Maloney's cost mark and selling price, in Maloney's handwriting. Jennings' arrest was a little time after that of Ray. On his person was one knife, and near by him, and where he had been, under the sill of the coal house, were found two revolvers and seven knives. About March 2, 1889, there were also found under a straw pile at Stanberry, tied up in a piece of calico, one hundred and fifty-eight pocket knives, eighteen razors and four revolvers. These were found about forty rods from where Jennings and Ray were arrested. These articles were turned over to the officers, and both W. N. Maloney and N. L. Maloney,

his clerk examined them; and both testify that they recognize a part of the goods as those taken from the store on that night. Appellant questions the reliability of such testimony on the ground of the difficulty of such recognition, but we think it of such a character that the jury might have found the fact. There are a few strong circumstances favorable to such a conclusion. The cartridge box and the piece of calico in which the goods were found were very positively identified as having been in the store; the patterns of the goods found corresponded with those taken, and then the faded condition of the boxes containing part of the goods when found corresponded with those taken with the goods, and in which they were kept.

A particularly controverted point is that, even if the goods are identified, and so traced to the possession of the defendant as to justify a presumption of the larceny, there is nothing to justify a finding that defendant committed the burglary for which he is indicted. In this respect, appellant relies on the cases of *State v. Shaffer*, 59 Iowa, 290, and *State v. Tilton*, 63 Iowa, 117. The latter case is so different in its facts that the rule therein announced is of no aid to a conclusion in this case. The argument, however, requires that we should settle an alleged question of conflict of authority in this state. The offense charged in the case of *State v. Golden*, 49 Iowa, 48, is like that in the case at bar, and upon the question of presumption arising from the possession of recently stolen goods from a burglarized building this court approved an instruction like this: "If parties are found in possession of goods recently stolen by breaking into a store-room, and which have been stolen by breaking into a store-room, it raises a presumption that such parties have stolen the goods by breaking into a store-room. This presumption may be rebutted by the defendant's explaining such possession. The burden is on the state to prove that such goods were stolen from a store-room before such presumption exists." The instruction is somewhat peculiar in its construction;

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and, while it is approved, the language of the opinion should be consulted to know the true intent of the ruling. The language there indicates that while from such facts the burglary may be inferred, it is not, as a matter of law, to be. The opinion speaks of the "value or persuasive power" of such facts being for the determination of the jury. The latter part of the first division of the opinion expresses the rule somewhat broadly; but, modified, as we think it should be, by the reasoning of the opinion, the result we have given is the one fairly deducible. In the case of *State v. Shaffer*, 59 Iowa, 290, it is held that such a possession of stolen goods is not *prima-facie* evidence of the burglary. The instruction which was the subject of the ruling was to the effect that such facts are "*prima-facie* evidence that the defendant broke and entered the building." That was held error, and, although the language of the opinion may be technically of broader significance, it should be accepted as limited by the subject to which it applies, and as announcing no other rule. In *State v. Rivers*, 68 Iowa, 611, the court instructed the jury, in substance, that the possession of goods recently stolen from a burglarized building would warrant them in finding that the defendants stole the goods by breaking and entering the buildings. This instruction was approved, and it is distinguishable from that in the *Shaffer* case in this: That it does not attach a legal effect to the fact of possession, but leaves the jury with a discretion. While the jury would be warranted in finding the fact of breaking from the fact of the possession, having in view the particular facts and surrounding of such possession, it is not required so to do. No definite presumption follows the possession, as a matter of law, and the burden is not necessarily shifted to explain the possession.

No complaint is made in this case as to the instructions given, and our examination discloses no error therein. Under the evidence in the case, we think the jury was justified in finding that the defendant broke and entered the store in question. The judgment is

AFFIRMED.

79	518
79	534
79	518
80	100
79	518
118	150
79	518
133	525

BEARD & SONS V. THE ILLINOIS CENTRAL RAILWAY COMPANY.

1. **Carriers : DUTY TO CARE FOR GOODS CARRIED.** A carrier must use due diligence to protect goods which he receives for carriage from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated ; and he must have regard to the character of the goods he transports. And so, where defendant in summer time shipped butter in refrigerator cars from northern Iowa to New Orleans, and it was carried in such cars to St. Louis, and was there delivered to an intermediate carrier, who placed it in ordinary cars and transported it a short distance, and then turned the cars over to defendant, and the defendant transported it in the same cars, with no protection against the heat of the season, to New Orleans, and it was damaged by the heat, *held*—
 - (1) That it was defendant's duty to transport the butter in such cars as would have protected it from injury by heat.
 - (2) That, having accepted the butter for transportation, it could not avoid liability on the ground that it did not have the necessary cars to transport it with safety.
 - (3) That it could not be excused on the ground that the cars in which it received the butter were sealed.
 - (4) That a custom to haul the cars received from the intermediate carrier, without change of cargo, was no defense.
 - (5) That it was no defense that the rate of charges, as shown by the way-bill, was for common cars only. (See opinion for citations in support of the foregoing points.)
2. ——— : ——— : **EVIDENCE.** In such case, evidence tending to show that a custom prevailed among carriers by railroad to put butter into cold storage when refrigerator cars were not ready to receive it, was properly admitted to sustain the general allegation of negligence on defendant's part in not taking proper precautions to preserve the butter.
3. ——— : ——— : **PRESUMPTION AS TO CONDITION OF GOODS.** In such case the court properly instructed the jury that they might infer that the butter was in good condition when received by defendant, from the fact that it was shipped in good order, in a refrigerator car, for St. Louis. (See opinion for citations.)
4. **Instructions : TAKING ISSUE FROM JURY.** It is proper for the court to take from the jury an issue raised by a defense which there is no evidence to support.

Beard & Sons v. The Ill. Cent. Ry. Co.

Appeal from Cedar Rapids Superior Court.—HON.
JOHN T. STONEMAN, Judge.

FILED, FEBRUARY 10, 1890.

ACTION to recover damages for injury sustained by plaintiffs from the negligence of defendant in transporting a carload of butter, which it had received from an intermediate carrier, whereby the butter was greatly injured. There was a verdict and judgment for plaintiff. Defendant appeals.

Mills & Keeler and W. J. Knight, for appellant.

Rickel & Crocker, for appellees.

BECK, J.—I. The plaintiff delivered to the Burlington, Cedar Rapids and Northern Railway Company, at West Union, in two consignments, a large quantity of butter for transportation to New Orleans. The facts as to both separate consignments are identical. In the further statement of facts they will be referred to as but one transaction. The butter was put in refrigerator cars by the company first receiving it and was transported therein over connecting roads to St. Louis, where it was transferred by drays across the river, and delivered to the St. Louis, Alton and Terre Haute Railway Company, known as the "Cairo Short Line," and put in a common box car, and a lined fruit car, each of which was sealed, as is usually done, and sent on the same day to Duquoin, Illinois, and delivered to defendant, which transported it to New Orleans, in the same cars. The butter was not examined by defendant, and no attempt was made to ascertain its condition, on the probability that it could or would not be transported in the cars, without injury, to New Orleans. The Cairo Short Line Company billed the butter to New Orleans at a rate of freight charges for common cars. It appears that the consignment took the usual course of transaction between defendant and

1. CARRIERS:
duty to care
for goods
carried.

the Cairo Short Line, at Duquoin. It is not shown that plaintiff, or the initial or connecting carrier, made any demand of defendant or the Cairo Short Line Company for a refrigerator car, or for the protection of the butter from the effects of heat by the use of ice in the common car in which it was transported, and it is not shown that plaintiff, or the initial carrier, or the connecting companies to St. Louis, had any notice or information in any way, directly or indirectly, of the shipment of the butter without protection from the effects of the heat, nor did they have any notice or information of the practice and course of business adopted by defendant and the Cairo Short Line at Duquoin. We are required to determine whether, under the law upon these facts, the defendant is liable. The discussion of this question will dispose of certain objections made by the counsel of defendant to the rulings of the court below upon instructions and admissions of evidence.

II. We will proceed to inquire as to the duty of defendant upon receiving the butter in a car from the Cairo Short Line for transportation to New Orleans, without directions or instructions as to the character of the car in which it should be carried. A carrier's duty is not limited to the transportation of goods delivered for carriage. \ He must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counteracted. He must guard the goods from destruction or injury by the elements; from the effects of delays; indeed, from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated. \ Unknown causes, or those which are inherent in the nature of the goods, and cannot be, in the exercise of diligence, averted, will not render the carrier liable. The nature of the goods must be considered in determining the carrier's duty. \ Some metals may be transported in open cars. Many articles of commerce, when transported, must be protected from rain, sunshine and heat,

and must have cars fitted for their safe transportation. Live animals must have food and water, when the distance of transportation demands it. Fruit, and some other perishable articles, must be carried with expedition and protection from frost. So the carrier must attend to the character of the goods he transports. He is informed thereof by inspection of the freight-bills, or by other papers accompanying the shipment.

In the case before us the marks on the packages and the way-bill disclosed that the subject of shipment was butter. The employes of defendant were endowed with intelligence which taught them that the season was summer, when warm weather prevailed; that butter, in common cars, would be greatly injured by the ordinary heat of the climate; and that the butter, as it approached its destination, would be subject, by reason of the change of latitude, to greatly increased heat from the weather. All these things are familiarly known to all men. Surely, the law will presume that defendant's employes had full knowledge thereof. The law required the defendant, having received the perishable cargo involved in this suit, to exercise the care and diligence necessary to protect it; and, if improved cars for the transportation of articles of commerce liable to injury from heat were in use, it was defendant's duty to use such cars in carrying the butter. These views are supported by the following, among other, cases: *Hewett v. Railway Co.*, 63 Iowa, 611; *Sager v. Railway Co.*, 31 Me. 228; *Hawkins v. Railway Co.*, 17 Mich. 62, 18 Mich. 427; *Railway Co. v. Pratt*, 22 Wall. 123; *Wing v. Railway Co.*, 1 Hilt. 241; *Merchants' Dispatch & Trans. Co. v. Cornforth*, 3 Colo. 280. As to the duty of defendant to use cars so constructed and used as to avoid injury from heat, see *Hutch. Carr.*, sec. 294; *Boscowitz v. Express Co.*, 93 Ill. 525; *Steinweg v. Railway Co.*, 43 N. Y. 123.

III. But it is said: (1) That defendant did not have refrigerator cars which it could have used on the day it received the butter; (2) that the cars were sealed; (3) that it was accustomed to haul the cars received

Beard & Sons v. The Ill. Cent. Ry. Co.

from the Cairo Short Line without changing the cargo. We may here assume that defendant will be excused from using refrigerator cars. But it is shown that the butter could have been carried safely by the use of ice in the box cars. It was defendant's duty to use it. But, having accepted the butter for transportation, defendant cannot escape liability for not safely transporting it, on the ground that it did not have cars sufficient for that purpose. *Railway Co. v. Swift*, 12 Wall. 262; *Helliwell v. Railway Co.*, 7 Fed. Rep. 76; *Paramore v. Railway Co.*, 53 Ga. 385. The sealing of the car was not to protect it from defendant, the carrier having it under control. Surely, if it was necessary for the protection of the goods, defendant had full power to enter the car, and failure to exercise the power was negligence. *Dixon v. Railway Co.*, 74 N. C. 538. The custom of the defendant and Cairo Short Line cannot be invoked to protect one or both from negligence causing destruction to goods transported by them. A custom to take cars without changing the goods in them, when their safety demanded it, would be a custom based upon negligence, and cannot be regarded or enforced. *Hamilton v. Railway Co.*, 36 Iowa, 31; *Allen v. Railway Co.*, 64 Iowa, 95.

IV. It is said that the rate of charges, as shown by the way-bill, was for common cars, and the defendant, therefore, undertook to furnish no other kind. If the freight charges fixed in the way-bill do not express a contract that the butter may be transported so as to destroy its value, and that the carrier is excused from the exercise of the care required of him by law, we think the freight charges in no case will limit the care to be exercised by the carrier, and restrict his liability. The defendant was not restricted, by the rate of freight charges named in the way-bill, from claiming and enforcing the payment of a just compensation for charges incurred on account of outlays made in order to safely transport the goods. *Sumner v. Railway Association*, 7 Baxt. 345. Many of the rulings of the district court upon the admission of evidence and instructions

Beard & Sons v. The Ill. Cent. Ry. Co.

objected to by defendant, are in accord with the views we have expressed.

V. Evidence was admitted, against defendant's objection, tending to show that a custom prevailed among carriers by railroads to put butter into cold storage, when refrigerator cars were not ready to receive it. This evidence was objected to, on the ground that the petition contained no allegation of negligence by reason of the failure of defendant to put the butter into cold storage. But the petition does charge negligence on the part of defendant in not taking proper precautions to preserve the butter. The evidence tends to show what precautions ought to have been taken in this case. Besides, the evidence serves to show that defendant's excuse for sending the butter in the common car, and for not retaining it until a refrigerator car on defendant's road came along, is not sufficient. It is shown that such a car was run on defendant's trains on two or three days each week.

VI. The superior court, in the seventh instruction given, directed the jury that they could infer that the butter was in good order when received by defendant, from the fact that it was shipped in good condition, in a refrigerator car, for St. Louis. Of this instruction defendant complains. It is correct. The presumption arises that goods shipped in good order continue in that condition when in the hands of a connecting carrier. The burden rests on such carrier to show that they were not in good condition when received by him. *Hutch. on Carr.*, sec. 761; *Shriver v. Railway Co.*, 24 Minn. 506; *Leo v. Railway Co.*, 30 Minn. 438; *Laughlin v. Railway Co.*, 28 Wis. 204; *Dixon v. Railway Co.*, 74 N. C. 538; *Paramore v. Railway Co.*, 53 Ga. 385.

VII. The defendant, in its answer, set up as a defense that plaintiffs had fully compromised this claim for loss of the butter with preceding connecting carriers, transporting the butter to defendant. The court withdrew the issue upon this defense from the jury, on the ground

2. — : — :
evidence.

3. — : — :
presumption
as to condi-
tion of goods.

4. INSTRU-
CTIONS : taking
issue from
jury.

Nimon v. Reed.

that there was no evidence supporting the defense. Of this ruling the defendant now complains. The court, we think, ruled rightly. The evidence totally fails to show a settlement. The most that could be said is that the evidence shows propositions for settlements, and agreements to settle. But it is not shown, as is alleged in defendant's answer, that there was in fact a settlement and payment thereon, and a discharge of the claim. The action of the court in this regard is correct. The foregoing discussion disposes of all the questions requiring consideration in this opinion. The judgment of the district court is **AFFIRMED.**

NIMON V. REED.

Replevin: DELIVERY BOND: LIABILITY OF SURETIES FOR NON-DELIVERY. In an action to replevy pumping machinery which was in use in a mine, the machinery was left with the defendants upon their executing a delivery bond, on which defendant herein was surety. There was judgment for the return of the property. *Held* that it was not the duty of defendants in the replevin action to remove the machinery from the mine and deliver it above ground to plaintiff, and that for a failure so to do, after tendering it to plaintiff where it was, the sureties on the delivery bond were not liable.

Appeal from Guthrie District Court.—HON. J. H. HENDERSON, Judge.

FILED, FEBRUARY 10, 1890.

ACTION upon a bond given in the prosecution of an action of replevin in the state of Colorado. Only one of the sureties upon the bond was served with process or appeared in the case. Judgment was rendered on a verdict against him. He now appeals.

E. W. Weeks, for appellant.

W. H. Stiles, for appellee.

BECK, J.—I. The petition alleges that the bond in suit was given in an action of replevin prosecuted in the state of Colorado; that plaintiff, who was plaintiff in that action, recovered a judgment therein against the defendants in the action for the possession of the property, and also a judgment for the delivery or return of the property whenever a writ was issued for its return; the property having been restored to defendants, after service of the writ of replevin, upon the execution of a bond for its return. The defendant, in his answer, denies all the allegations of the petition, and pleads specially as defenses, among other matters, that the property at all times since the execution of the bond has been in the place and in the condition it was at the time, and that plaintiff could have taken at any time full possession thereof; that the property, being pumping machinery used in a mine, has been in position and condition to be used or operated, and that it may be removed to any place to which the plaintiff may desire to remove it; that defendants in the replevin action, the principals in the bond sued on, have at all times been ready and willing to perform the conditions of the bond, and have offered and attempted so to do, and have tendered the property to the sheriff and the plaintiff. Upon the issues found upon these pleadings, the cause was submitted to the jury. There was evidence tending to show the condition of the property when the bond in suit was given; that it was set up for use in a mine; that it remained in that condition until after the writ for the return of the property was issued, which was not served for the reason set out in the return of the sheriff, which is in the following language: “I do hereby certify that I have demanded of George W. France, one of the within named defendants, the property as described in this, the within writ, also the sum of \$152.40, for costs, as I am therein commanded. The said George W. France proposed to go up to the Coon Valley lode mining claim, where he claimed said property was, in the working shaft of said Coon Valley

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lode mining claim, and turn the same over to me; but, as the said property was nearly all under water, I could not accept of it in that condition, as the within-named James Nimon, plaintiff, by his attorney, Scott Ashton, would not accept of said property in said condition from me. No property found belonging to the said George W. France or W. S. Harlan, defendants, whereby I make the said \$152.40; or any part of the same; and, as this writ has expired, I hereby return the same to the court from which it was issued." Evidence was also introduced tending to show that defendants in the replevin action tendered the property, or offered to deliver it, to plaintiff. The district court directed the jury in the following language: "A mere tender, and the direction as to where the property was, is not a sufficient compliance with the terms thereof, nor would the plaintiff be required to be at any expense in finding or securing said property; but, under bond, the parties thereto were to deliver the same to him. The proof in this case does not show a delivery of the property in compliance with the terms and condition of the bond. The testimony shows that on the date of the trial wherein a judgment for the return of the property was rendered the principals on the bond in suit offered to return the property, and that thereafter the only reason shown for its non-delivery was the refusal to accept of the property in the mine where it was situated; and that a writ had been issued for the return of the property. Such facts constitute in law a demand and a refusal, and entitle the plaintiff to recover on the bond in suit. The plaintiff is therefore entitled to recover of the defendant on the bond in suit to the amount of said bond, to-wit, eight hundred and seventy dollars, with six per cent. interest from the thirtieth day of July, 1883, until the day of the rendition of your verdict; and you will therefore return your verdict in said sum."

II. The court below, it will be noticed, instructed the jury that upon the facts proved they should find

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for plaintiff. The instruction is clearly erroneous. The controversy between the parties clearly rested upon one question, viz., whether the defendant in the replevin action was by the law required to remove the machinery from the shaft of the mine, and deliver it above ground to plaintiff. Defendant found the machinery in the mine. It was put there for use connected with the mine. It does not appear that it was ever the purpose of defendants to remove it from the mine, or that he was under any obligation, created by law or contract, to remove it. Surely the evidence submitted to the court does not authorize the conclusion that the defendants were bound to deliver the machinery to plaintiff above ground, or at any other place than just where it was put for use. We think the district court's conclusions upon the facts are wrong.

III. They are erroneous for another reason. The evidence upon which rested a determination of the questions as to the place at which the delivery should be made, and the manner thereof, and whether there was a tender, should have been submitted to the jury for findings of the facts. But the court assumes to discharge the functions of the jury, and find the facts. The issues involving the facts should have been submitted to the jury, under proper instructions.

Other questions discussed by counsel need not be determined. For the errors pointed out, the judgment of the district court is

REVERSED.

 BEARD & SONS V. THE ST. LOUIS, ALTON AND TERRE HAUTE RAILWAY COMPANY.

1. **Carriers: CONTRACT TO TRANSPORT GOODS: INTERPRETATION.**

The acceptance by a carrier in the state of Illinois of goods for transportation, which are marked for carriage beyond the terminus of such carrier's line, establishes *prima facie*, under the laws of that state, a contract for the transportation of the goods to their place of destination, so as to make such carrier liable for

79	527
83	745
79	527
86	830
79	527
115	616
79	527
116	185
79	527
1143	563

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damage to the goods through the negligence of a subsequent carrier; and it makes no difference that the carrier so accepting the goods is not the initial carrier, but itself received the goods from a previous carrier.

2. **Appeal: NEW DEFENSES NOT CONSIDERED.** Defenses not pleaded and relied on in the court below cannot be considered when raised by argument in this court.
3. **Carriers: TRANSPORTATION OF BUTTER: CARS TO BE USED.** A railroad company which undertakes to transport butter a long distance in hot weather is not relieved from the duty of carrying it in refrigerator cars, on the ground that the rate of charges named is the rate for common cars. The contract being silent as to the kind of cars to be used, the company is obliged to use such cars as are necessary to transport the butter in good order. (Compare *Beard v. Railway Co.*, ante, p. 518.)

Appeal from Cedar Rapids Superior Court.—HON.
JOHN T. STONEMAN, Judge.

FILED, FEBRUARY 10, 1890.

ACTION to recover damages for injury sustained, through negligence of defendant, to a large quantity of butter shipped by plaintiff from West Union, Iowa, to New Orleans, Louisiana; the butter being carried over a part of the route by defendant. The cause was tried without a jury, and judgment was entered for defendant. Plaintiffs appeal.

Rickel & Crocker, for appellants.

Mills & Keeler, for appellee.

BECK, J.—I. The butter in question was shipped from West Union upon the Burlington, Cedar Rapids & Northern railway. Its destination was New Orleans. It passed over two other railroads before it reached St. Louis, and by the last one transporting it, the Wabash, St. Louis and Pacific, it was delivered to a transfer company, and was carted across the Mississippi river bridge, and delivered to defendant. It was transported to St. Louis in refrigerator cars, and was in good condition when delivered to defendant, by whom it was put in common cars, and in a few hours transported to

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Duquoin, Illinois, and the cars then delivered to the Illinois Central Railway Company, whose road extended to New Orleans. It was transported by the latter company to New Orleans in the cars in which it was transported by defendant, and was greatly injured by the heat of the cars. It is shown that the butter was delivered by defendant to the Illinois Central Railway Company in good order and condition. It was transported to St. Louis in refrigerator cars, and in a few hours after it was taken from these cars delivered by defendant to the Illinois Central Railway Company, and was transferred by that company in the common cars in which it was delivered to it. There were two separate shipments of butter involved in this action, but the two transactions present the same state of facts. The receipts executed by the defendants for the butter are in the following form :

"No. 5632. CAIRO SHORT LINE.

" Wagon No. 91-96.

"EAST ST. LOUIS, 5-30-1885.

"Received from St. Louis Transfer Company, in good order, the following property for transportation:

"Consignee, Wm. Beard & Son.

"Destination, New Orleans, La.

"Consignor, Wab. Pro. 2794, M. W.

Marks.	Description of Articles.	Weight.	Trans. Chgs.
107	Tubs butter.	6950	
	O. R.		3.48
	Chgs., - - - \$41.70		

"H. ROEDERER, Agent.

"(Copy.)

D. 5-30.

"Nfy. C. H. Lawrence & Co., New Orleans, La.

"Mkd. Cloverdale Cry."

The way-bills accompanying the butter are in this form :

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“Weighed at.....”

Form 176.

“Gross.....”

ST. LOUIS, ALTON & TERRE HAUTE RAILROAD CO.
(ST. LOUIS & CAIRO SHORT LINE.)

“Tare.....”

No. W. B., 59. No. of car, 2503. Whose car, B.

“Net.....”

“May 30, 1885.

“From East St. Louis to New Orleans, La.

Shipper.	Consignee and Destination.	No. of pkgs.	Description of Articles.	Weight.	Rate per 100 lbs.	Advanced Charges.	Prepaid over other lines.	Freight Prepaid.	Freight Unpaid.
5132	Wm. Beard & Son,	107	Tubs butter,	6950	53	3.48			36.84
71	New Orleans, La. Nfy. C. H. Lawrence & Co.		O. B. (Marked Cloverdale Cry)			40.70			

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II. We are of the opinion that the acceptance of the butter by defendant, marked so as to show its destination, and the receipt and way-bill showing that it was destined to New Orleans, and was to be transported there, with other facts of the case, established, *prima facie* at least, that defendant contracted to carry the butter to New Orleans. Other facts tend in the same direction. *Mulligan v. Railway Co.*, 36 Iowa, 181; *Angle v. Railway Co.*, 9 Iowa, 487. The way-bill showing the place of the receipt of the goods and their destination is evidence of the contract to transport the goods to the place of destination. *Railway Co. v. Pratt*, 22 Wall. 123. But in view of the fact that the butter was received by defendant in Illinois, and therefore the contract for transportation was made in that state, that contract must be enforced in accord with the law prevailing there, which holds that the acceptance of goods for transportation which are marked for carriage beyond the terminus of the receiving carrier's line of transportation establishes *prima facie* a contract for transportation to the place of destination of the goods. *Railway Co. v. Wilcox*, 84 Ill. 240; *Railway Co. v. Montfort*, 60 Ill. 176; *Railway Co. v. Frankenberg*, 54 Ill. 97; *Railway Co. v. Johnson*, 34 Ill. 389. We conclude that defendant was bound by its contract to transport the butter to New Orleans, and that the finding of the court below to the contrary, which we are required to presume, as the finding of the issues were for defendant, is wholly without support of the evidence. Counsel for defendant insist that the cases just cited are not applicable to this case, for the reason that the carriers in each instance were "initial carriers." We think the distinction cannot be urged in this case.

If it be true that an "initial carrier," by which expression we understand the carrier first receiving the goods, is bound for the default of connecting carriers, it is because of a contract binding him to that effect.

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Such a contract may be expressed or implied from the facts connected with the transaction. If the "initial carrier" entered into no contract to that effect, he is not so bound. If he does so bind himself, he is liable for the default of the connecting carrier. Now, surely, there is nothing in the law forbidding the intermediate carrier to bind himself by contract to answer for the default of his connecting carriers. If he may so bind himself, no reason can be given why the same evidence, regarded as sufficient to establish a contract by the "initial carrier," will not establish such a contract made by the intermediate carrier. That the butter was injured by negligence in transporting it in a common car from Duquoin to New Orleans cannot be doubted. As defendant contracted for its transportation to New Orleans, it is liable for the injury sustained by the negligence of the connecting line, the Illinois Central railroad.

III. As we understand counsel for defendant, they insist that this action is based upon negligence, and not upon a contract. The position is not in accord with the record before us. The petition alleges that defendant "undertook to transport the butter over its line, and to the place of destination." As we understand the petition, plaintiff seeks to recover on this alleged contract, on the ground of the violation thereof by the defendant negligently transporting the butter, whereby it was injured.

IV. It is urged, against the view we have taken of the case, that it does not appear that the station-agent receiving the butter was authorized to contract for its transportation beyond the terminns of defendant's railroad. No such issue is raised in the pleadings, and it is not claimed, that the receipt for the butter was executed by the station agent without authority. Indeed, defendant, in his answer, admits the execution of the receipt, but denies that it was bound thereby to transport the butter beyond the terminus of its own

2. APPEAL: new
defenses not
considered.

line. The execution of the receipt, and the authority of the agent signing it to bind the defendant, are not put in issue. Defendant simply denies that the contract binds it to carry the butter to New Orleans. The interpretation of the contract to that effect is relied upon to sustain the defense, not the want of authority to execute it.

V. It is also objected that it is not shown in the record that the St. Louis Transfer Company had authority to contract for plaintiff with the defendant for the transportation of the butter beyond the terminus of its own line. No such defense is set up in the answer. On the contrary, it admits the execution of the receipt to the plaintiff. It cannot now insist that the receipt is inoperative, for the reason that it was received by one not authorized to contract for plaintiff. The point demands no further consideration.

VI. Counsel insist that the evidence shows that it was understood that the butter should be carried through from St. Louis to New Orleans in common cars, and that various facts appearing in the evidence authorize such an interference. We cannot assent to this proposition. It may be admitted that the evidence shows no specific agreement for any specific class of cars entered into between the transfer company and defendant. The butter was delivered to defendant, and nothing said about the character of the cars to be used in its transportation. It may be admitted that the rate of charges named was the rate for common cars. But there was no agreement that the butter should be transported in such cars, and that due care should not be exercised in its transportation to protect it from injury on account of the heat. The carrier was bound to exercise the diligence demanded by law for the safety of the butter, and its protection from injury. It was bound to use the degree of diligence which a carrier must exercise for the safety of the goods he carries. It was bound to

8. CARRIERS :
transporta-
tion of butter:
cars to be
used.

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provide refrigerator cars, or other cars, in which ice could be and should be used, to protect the butter from the heat; and until such cars could be provided it was required to put the butter in cold storage. See *Beard v. Railway Co.*, ante, p. 518. This discussion leads us to the conclusion that the judgment of the superior court ought to be

REVERSED.

BIGHAM V. THE CHICAGO, MILWAUKEE AND ST. PAUL
RAILWAY COMPANY.

Railroads: NURSE FOR INJURED EMPLOYEE: CONTRACT OF HIRING: AGENCY: EVIDENCE. In this action to recover on an alleged contract for services rendered in nursing an injured employee of defendant, the evidence bearing upon the alleged contract of hiring is considered (see opinion) and *held* to warrant the finding of the jury that plaintiff was hired by defendant, through its claim-agent and surgeon, as alleged.

Appeal from Wapello District Court.—HON. DELL
STUART, Judge.

FILED, FEBRUARY 10, 1890.

ACTION to recover for services rendered by plaintiff in nursing and caring for Thomas Bigham, an employee of defendant, who had received personal injuries while in the discharge of his duties, and was taken care of, and a physician provided, by defendant. A judgment upon a verdict was rendered for plaintiff. Defendant appeals.

Chambers, McElroy & Roberts, for appellant.

No appearance for appellee.

BECK, J.—I. The plaintiff seeks to recover on two counts in his petition,—the *first* upon a contract under which he rendered the services; the *second* upon a

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quantum meruit. The defendant denies all the allegations of the petition.

II. One Hensey testified as follows: "I am special agent of the defendant, and have been for about twenty-two years. I have charge of the claim department of the road; and, in connection with personal injuries, I have charge of the doctors on the line, to the extent of appointing them, and giving general directions as to injured employes. I know Dr. Pangburn, of Perry, Iowa, and Dr. Kibby, who lived, while I knew him, at Marion, Iowa. They were both acting as surgeons for defendant in 1882 and 1883. Their duties, as company surgeons, were to attend injured employes or passengers when directed so to do by any one authorized to direct them. In case of severe injury, when one or more nurses were necessary, I would give directions in reference to the employment. The surgeon had no authority to employ nurses without first obtaining my consent. I remember of the case of Thomas Bigham. He was under the medical care of Drs. Kibby and Pangburn, most of the time attended by Dr. Pangburn, the local surgeon. They had no general authority to employ nurses. They reported to me that they would require two nurses for some time. I directed that they should be employed. They employed and retained two for some time, then dispensed with the services of one, and kept the other for some period longer. The only persons the doctors reported to me as having been employed were L. J. Russell, G. S. Martin and James Thomas. I did not authorize Drs. Kibby and Pangburn, or either of them, to employ Charles Bigham as a nurse."

It will be observed that Mr. Hensey does not testify that special authority indicating the nurse was required to authorize his employment, but that the surgeon had special authority to employ two nurses. The last sentence, therefore, does not show the want of authority to employ plaintiff. It must be read in connection with all the evidence of the witness.

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Dr. Pangburn, referred to in the foregoing evidence of Mr. Hensey, testified as follows: "I have been a practicing physician twenty-three years, of which nineteen years was at Perry. I first saw Thomas about twenty minutes after he was injured, and saw him three or four times every day from that on. I attended him very closely. Lewis Russell was the first nurse employed. Then there was an assistant, Martin, employed. There were two nurses, at first, which were employed. One of them, Martin, was discharged in about twenty days, and then Lewis Russell alone continued as the only regular employed nurse. Afterwards Russell was discharged, and a man by the name of Thomas put in his place. As stated, there were at first two regular employed nurses,—Russell and Martin. They both continued for about twenty days, and then I discharged Martin, and retained Russell. Charles Bigham came there after his mother had gone home—whether by my request, or by the request of his brother and mother, I cannot say. I don't know as I ever wrote him a letter. I might have written a letter for his brother and his mother, at their request. I could tell you the contents of it, if I wrote one. I never wrote a letter to him in my life stating any amount of wages. I never made any statement to him in regard to the matter in the world. I am positive of it. I had no authority whatever, from any one, to make such a statement."

The plaintiff, Charles S. Bigham, testified as follows: "In January and February, 1883, I was nursing Thomas J. Bigham at Perry, Iowa. I went in response to a letter I received from Perry, Iowa, signed S. Pangburn, M. D. The letter is lost. I showed the letter to my brother. I first saw Dr. Pangburn at Mr. Morgan's house, at Perry, between December 14 and 20, 1882, and saw him daily, after that, for five months while he was attending my brother. I also saw Dr. Kibby, of Marion, there, two or three times. When I came there, two attendants were waiting on my brother,—George

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Martin and Lewis Russell. I was there four or five days, when Martin was discharged, and I took his place. I commenced nursing about the twentieth of December. Thomas had both of his legs in boxes, and couldn't move, and there had to be two men with him all the time, to take care of his legs. He laid right on his back, like he was nailed to a cross, for about five months. James Thomas was a nurse during the last part of the time. He left in the last part of March, or the first part of April."

William Bigham testifies in the following language: "My age is thirty years, residence, Ottumwa, and have been a brakeman for nine years. I went down to Perry, Iowa, on December 27, to see my brother Thomas, after he was hurt. He was lying there with his legs mashed pretty nearly off of him. He had both legs in a box. Charles was there, attending on him. Charles showed me a letter, signed S. Pangburn, M. D., at the bottom of it.

"It read :

"*'Charles Bigham, Ottumwa:*

"*'You come up to Perry, at once, to attend on your brother, and you will get \$1.50 for every day you are here, for your services.*

"*'S. PANGBURN, M. D.'*

"I saw that letter on the night of December 27, 1882. At that time Tom looked like he had both legs mashed off, and that he would have to have both of them taken off, and looked like he would live about a week. His legs were all to pieces. There was no other nurses there at the time except Charles. He was right there all the time, aside of Tom, nursing and attending to him. I stayed there until about ten o'clock the next morning. During all that time Charles was doing something about Tom. He kept up the fires. I was there once after that, in June. When Tom came home, in May, 1883, his condition was bad. He was on a pair of crutches, and used them for two or three months after he came home." Charles S. and William Bigham are brothers of the

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injured man. There was other evidence tending to show the necessity for plaintiff's services as a nurse.

III. It cannot be doubted that this evidence tends to prove the authority of Hensley to authorize the employment of nurses, and that he did confer special authority upon Dr. Pangburn to employ two nurses, and he, pursuant thereto, did employ plaintiff. It cannot be said that the verdict for plaintiff is not sufficiently supported by this evidence. An instruction properly directed the attention of the jury to it.

IV. The testimony shows that the assistant superintendent was present while plaintiff was rendering the services for which the action is brought, and probably some other evidence shows his knowledge of the treatment of the injured man. The court below directed the jury that if the assistant superintendent had general supervising authority over the defendant's interest, he possessed authority to employ nurses, and that unless he had such authority, and did employ plaintiff, or authorized his employment, what he said or did should not be considered. We think the instruction is correct. But counsel say there is no evidence as to the authority of the assistant superintendent. We think otherwise.

V. Other complaints as to the instructions and evidence are based mainly on the view that the evidence fails to show that defendant was employed by contract. But, as we have seen, the evidence sufficiently supports the conclusion that plaintiff was employed by defendant through its agents. The jury were authorized so to find, and, we will presume, based their verdict upon such finding. The instruction relating to the right of plaintiff to recover upon the *quantum meruit* cannot, and the evidence admitted thereto could not, have worked prejudice to defendant. Objection thereto need not, therefore, be considered. It is our conclusion that the judgment of the district court ought to be

AFFIRMED.

THE WESTERN LAND COMPANY V. HAMBLIN.

Public Lands : RAILROAD GRANTS : CONCLUSIVENESS OF LOCATION.

By act of congress of May 12, 1864, and certain acts of the general assembly of Iowa pursuant thereto, the odd-numbered sections of land for ten miles on each side of a railroad to be constructed by the McGregor Western Railroad Company, from McGregor, Iowa, to an intersection in O'Brien county with the Sioux City and St. Paul railroad, not yet constructed, were granted to the said McGregor Western Railroad Company; and the act of congress provided that, as soon as maps designating the route of said road should be filed in the office of the secretary of the interior, he should withdraw from market the lands embraced within the provisions of the act, as indicated by said maps. Such maps were filed in August, 1864, showing an intersection of the line of the road with the proposed line of the Sioux City and St. Paul railroad in O'Brien county. But the location of the line of the latter road was afterwards so changed that a change of the line of the McGregor road was necessary in order to make the intersection required by the act of congress first above referred to. The McGregor company accordingly relocated the western portion of its line so as to make the intersection, and in 1869 filed new maps showing the line as relocated, and such relocation was permitted and approved by the secretary of the interior. *Held* that the first location, failing to meet the requirement of the act of congress, was not final and conclusive as to the sections of land included in the grant; that the secretary of the interior was authorized, without another act of congress, to withdraw from sale the lands within ten miles of the newly located line; and that defendant could not acquire a homestead right to an odd-numbered section within ten miles of the line as located in 1869, though it was more than that distance from the location of 1864.

Appeal from O'Brien District Court.—HON. SCOTT M. LADD, Judge.

FILED, FEBRUARY 10, 1890.

ACTION to recover the possession of real estate. There was a trial by the court, and a judgment for plaintiff. The defendant appeals.

Joy, Hudson & Joy, for appellant.

George E. Clarke and John S. Monk, for appellee.

ROBINSON, J.—The land in controversy is the northeast quarter of section 1, in township 95 north, of range 41 west, in O'Brien county. The plaintiff claims ownership thereof by virtue of the following statutes and conveyances, to-wit: An act of congress entitled "An act for a grant of land to the state of Iowa in alternate sections, to aid in the construction of a railroad in said state," approved May 12, 1864 (13 St. at Large, 72); chapter 134, Acts Eleventh General Assembly; chapters 16, 42, 58, Acts Twelfth General Assembly; chapter 96, Acts Sixteenth General Assembly; chapter 21, Acts Seventeenth General Assembly; patent from the United States to the state of Iowa; patent from the state of Iowa to the Chicago, Milwaukee and St. Paul Railway Company; deed from the said company to plaintiff; also by virtue of an alleged compliance with the act of congress cited and certain of the acts of the general assembly. The defendant claims an interest in the land by virtue of an application made by him to enter it under the homestead laws of the United States, and by virtue of his occupation and improvement thereof. The district court found and adjudged that plaintiff was the unqualified owner of the premises, with the right of immediate possession.

I. The act of congress approved May 12, 1864, granted to the state of Iowa, "for the purpose of aiding in the construction of a railroad from Sioux City, in said state, to the south line of the state of Minnesota, at such point as the state of Iowa may select;" also "for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said state, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota state line, in the county of O'Brien, in said state,—every alternate section of land designated by odd numbers, for ten sections in width on each side of said roads." The act provided that the lands granted

should be subject to the disposal of the legislature of this state for the purposes stated, and for no other. It further provided that, if the McGregor Western Railroad Company or assigns should fail to complete at least twenty miles of its road during each year from the date of its acceptance of the grant, the state might resume the grant, and so dispose of it as to secure the completion of a road on the line specified, upon such terms, and within such time, as the state might determine. Section 5 was as follows: "And be it further enacted that, as soon as the governor of said state of Iowa shall file, or cause to be filed, with the secretary of the interior, maps designating the routes of said roads, then it shall be the duty of the secretary of the interior to withdraw from market the lands embraced within the provisions of this act." The grant was accepted by the state of Iowa, in trust for the purposes designated by the act. In the year 1868, the McGregor Western Railroad Company having failed to comply with the provisions of the granting act, the grant, so far as it was designed for the benefit of that company, was resumed by the state, and conferred upon the McGregor and Sioux City Railway Company, afterwards known as the McGregor and Missouri River Railway Company. In the year 1876, the terms of the grant to the last-mentioned company not having been complied with, the grant, excepting the land lying within twenty miles of the line of the Sioux City and St. Paul Railroad Company, was resumed by the state, and regranted to the McGregor and Missouri River Railway Company. That company having failed to meet the requirements of the act of the general assembly of 1876, the grant to it was resumed by the state in the year 1878, and conferred upon the Chicago, Milwaukee and St. Paul Railway Company, by which a railway was built from Algona to Sheldon, where it intersected the Sioux City and St. Paul Railway in O'Brien county. A railway was thus completed on substantially the line contemplated by the act of congress, having been constructed by the different beneficiaries of the grant named in the act of congress, and

the several acts of the general assembly of the state of Iowa. The completion of the road was certified to the secretary of the interior by the governor of the state on the tenth day of November, 1878. Previous to that time, to-wit, in June, 1873, the general government had patented the land in controversy, with other lands, to the state of Iowa, for the use and benefit of the Sioux City and St. Paul Railroad Company, under the act of congress of May 12, 1864.

In the year 1879 the Chicago, Milwaukee and St. Paul Railway Company instituted an action in the circuit court of the United States for the district of Iowa, to which the Sioux City and St. Paul Railroad Company, certain trustees, and the governor and register of the state land-office of the state of Iowa, were made parties defendant. The purpose of the action was to recover certain lands to which the Milwaukee company claimed title, including that in controversy, by reason of having complied with the terms of the grant to it. The litigation extended through several years, and included an appeal to the supreme court of the United States. See 117 U. S. 406; 6 Sup. Ct. Rep. 790. It resulted in a final decree rendered on the twenty-first day of May, 1886, which determined, among other things, that the land in question belonged to the Milwaukee company, and required the Sioux City and St. Paul Railroad Company to convey it to that company.

Appellant took possession of the land in February, 1884, and during that month he made application to enter it under the homestead laws of the United States. He built a house upon the land, made other improvements, and has resided thereon since March, 1884. His first application to enter it seems to have been rejected or withdrawn, as he made a second one in September, 1885. The evidence as to that is meager, but, since he took an appeal from something not stated, we infer that it was rejected. Defendant claims some right to enter the land by virtue of a letter from the commissioner of

the general land-office written in 1884, and a conversation had with him in 1885, but the record does not disclose what was contained in the former, or said in the latter.

II. On the thirtieth day of August, 1864, the McGregor and Western Railroad Company filed in the office of the commissioner of the general land-office a map showing the location of its road. The western terminus of the road thus indicated was in section 19, township 95 north, of range 40 west, in O'Brien county, at a proposed intersection with the Sioux City and St. Paul railroad. The proposed western terminus was south and east of the land in controversy. On the twelfth day of September, 1864, all the odd-numbered sections of public land, within twenty miles of the line of road as shown by the map, was withdrawn from the market. After that time, the line of the Sioux City and St. Paul railroad was so changed that it passed through the northwest corner only of O'Brien county; thereby making it impossible for the McGregor road to intersect it at the point first proposed, and requiring the point of intersection to be at least nine miles further north, and ten miles further west. In May, 1868, the commissioner of the general land-office requested that the McGregor company file a map showing the true location of its line through Clay and O'Brien counties, to the point of its intersection with the Sioux City and St. Paul road in O'Brien county. In November of the same year, the commissioner insisted that the surveying to determine the final location be done without delay, in order that the land to be held at \$2.50 per acre, within ten miles of the located line, might be determined in his office. In March, 1869, the McGregor company asked permission to withdraw its maps of definite location from the general land-office, and to relocate its road from the west line of range 27 to the intersection with the Sioux City and St. Paul railroad; stating that such relocation was made necessary by the change in the line of the last-named road. The permission asked

The Western Land Co. v. Hamblin.

was refused by the secretary of the interior in May, 1869, on the ground that the road having been once located, and the lands of the grant having been withdrawn from market, there was no authority for accepting a new location. However, in January, 1869, the McGregor company filed in the general land-office a map of the definite location of its road through Clay county, as amended; and in September of the same year filed a similar map, showing the definite location of its road in O'Brien county. Thereafter, the maps last filed were treated by the officers of the general land-office in instructions given to registers and receivers and otherwise, as showing the true line of the McGregor road through the counties named. The new line was north of the old from a point in the latter on the east boundary line of Clay county to the point of intersection with the Sioux City and St. Paul road in O'Brien county, and contained several abrupt changes in direction. The line, as finally constructed, varied somewhat from the second line of location, as shown by the map, the variation in places amounting to several miles; but the constructed line was more direct than the second line of location, and avoided several of the changes in direction of the latter.

In December, 1879, the attention of the secretary of the interior was called to the fact that the road of the Milwaukee company, from Algona westward, was not constructed upon the line of definite location indicated by the maps of 1869. In April, 1880, the secretary determined that the variation between that line and the one upon which the road was built was not sufficient to destroy the identity of the road; that it was constructed on the most practicable location, and met the requirements of the grant; and that the state was entitled to patents for the granted lands. The location, as shown and made by the map of 1864, does not seem to have been considered by the secretary in rendering his decision; but, in an official letter, written in 1870, by the commissioner of the general land-office, it was

treated as a temporary location as to O'Brien county, not definitely fixing the line of the road.

III. The questions raised by the pleadings are numerous, but most of those raised by the answer have been waived in this court. The matter now in controversy is stated by counsel for appellant as follows: "The vital question is, having located the line of road in August, 1864, and filed the map of definite location in the office of the secretary of the interior, and had the lands inuring to the grant withdrawn, based upon such location, can the line of definite location be changed by the company without the consent of congress, and, if changed, does the change extend or change the land grant as fixed by the definite location of the line of road in 1864?" The land in question was not within the limits of the grant, as indicated by the map of 1864, but is within the limits as shown by the maps of 1869, being less than ten miles therefrom, and is within eight miles of the road as finally constructed.

It is contended by appellant that all the requirements of the law in regard to the definite location of the road were fully complied with in 1864, and that the location then made was final, in the absence of consent by congress to a change; and that, as such consent was not given, the relocation of the road did not have the effect of extending the grant to land not included by the first location. In 1864, the line of the road was surveyed, a map showing the location was filed in the general land-office, and apparently accepted, and the odd-numbered sections within twenty miles on each side of the line thus located were withdrawn from the market. In ordinary cases, that would have been sufficient to locate the road definitely, for the purposes of the grant. *Van Wyck v. Knevals*, 106 U. S. 360; 1 Sup. Ct. Rep. 336; *Railway Co. v. Dunmeyer*, 113 U. S. 629; 5 Sup. Ct. Rep. 566; *Walden v. Knevals*, 114 U. S. 373; 5 Sup. Ct. Rep. 898.

But the rule contended for has no application to a case where the attempted location was not authorized

by the terms of the grant. In such a case, the filing and acceptance of the map could not have the effect of waiving the requirements of the granting act. In this case the act of congress required the McGregor company to build in a westerly direction until it should intersect the Sioux City and St. Paul road in O'Brien county. A road built on the line indicated by the map of 1864 would not have fulfilled that requirement; therefore, it was not the line contemplated by the granting act. When that fact became apparent, it was proper for the railway company to make a new survey, and file a new map, which should meet the requirements of the grant; and, when that was done, and the location was approved, the new line became the one to fix the limits of the land grant. It was not a relocation, but an original location, within the meaning of the granting act.

IV. It is said that the right to make a second location was denied by the secretary of the interior. He denied permission to the McGregor company to relocate its line of road west of range 27, but it is shown that the relocation of the line from a point forty miles or more west of range 27, to-wit, the east line of Clay county to an intersection with the Sioux City and St. Paul road, in O'Brien county was permitted and approved. It is true the road as built was not altogether on the line adopted in 1869, but the variations were deemed proper by the secretary of the interior, who held that the line as built met the requirements of the law. There is nothing in the record to overcome the presumptions which necessarily exist in favor of the legality of the acts of the officers of the general land-office.

The question of the legality of the location of 1869 was fully presented by the answer of the principal defendants in the case of *Chicago, M. & St. P. Ry. Co. v. Sioux City & St. P. Ry. Co.*, heretofore referred to, and appellee contends that its validity was necessarily affirmed in that case by the supreme court of the United

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States. The opinion of that court is found in 117 U. S. 406; 6 Sup. Ct. Rep. 790. It does not decide the question in terms, and for that reason is not wholly satisfactory as an authority in point. We think it is true, however, that the opinion was based in part upon the conclusion of the court that the location of 1869 was valid under the granting act of 1864.

V. Having reached the conclusion that the location of 1869 was valid and effectual to include the land in controversy in the grant, it becomes unnecessary to decide other questions referred to by counsel. The judgment of the district court is **AFFIRMED.**

BULL V. GILBERT *et al.*

1. **Execution: ISSUANCE AFTER DEATH OF JUDGMENT DEBTOR: SALE VOID.** The right of a judgment creditor to issue an execution against the property of his debtor terminates with the death of the debtor, whether the judgment be *in personam* or *in rem*, and a sale and deed made in pursuance thereof are void; and the fact that the property levied on under the execution is already held by the sheriff under a writ of attachment, levied before the death of the judgment debtor, will not affect the rule. (See Code, sec. 3183, and cases cited in opinion.)
2. **Attachment of Land: JUDGMENT: VOID SALE: LIEN: DURATION.** Where land was attached prior to the execution of a mortgage upon it, and after the execution of the mortgage judgment was rendered against the attached property, and the land was sold thereunder, but the sale was void, *held* that the judgment was not affected by the sale, but continued to be a lien on the land,—and the first lien,—until ten years after its date, after which time it was a lien no longer (Code, sec. 2882), and the mortgage, being still in force, became the first lien.
3. **Tax Sale and Deed: DEFECTIVE NOTICE TO REDEEM: CURED BY TIME AS AGAINST PRIOR MORTGAGE.** Although the proof of publication of notice to redeem from a tax sale is defective, the defect is cured by possession of the land for five years under the tax deed made pursuant to such notice, not only as against the former owner seeking to recover the land, but also as against a mortgagee of the former owner seeking to foreclose his mortgage; for the mortgage lien is extinguished with the title on which it is based. (See opinion for citations.)

79	547
120	741
79	547
142	364

Bull v. Gilbert.

Appeal from Carroll District Court.—HON. J. H. MACOMBER, Judge.

FILED, FEBRUARY 10, 1890.

THIS is an action in equity to foreclose a mortgage upon two quarter sections of land in Carroll county. Two demurrers to the petition were filed, which were sustained by the court, and plaintiff appeals. The facts appear in the opinion.

J. W. Bull, for appellant.

Benjamin I. Salinger and *George W. Paine*, for appellees.

ROTHROCK, C. J.—I. The cause was not really disposed of on the demurrers, although the formal order of the court in disposing of them is in the nature of a ruling on the demurrers. After the petition and demurrers were filed, and, for aught that appears, after the ruling thereon, the parties entered into a stipulation by which it was agreed that upon appeal to this court the cause should be tried “upon the facts admitted by the demurrers in said cause, and the facts and evidence attached to said petition, and covered by the stipulations heretofore filed, and the same shall be tried *de novo* in said court upon the merits, without assignment of errors.” The cause is, therefore, here for trial anew.

The material facts in the case, as we regard them, are not in dispute. They are either admitted by the demurrers, or appear in the record evidence attached to the pleadings. It appears from the record that on the sixteenth day of August, 1873, one Charles H. Berry was the owner of the land in controversy, which consists of the southeast quarter of section 35, and the northeast quarter of section 36, township 82, range 36. On that day he executed a mortgage upon said land to

Bull v. Gilbert.

one Samuel Showalter, to secure the payment of a promissory note for three thousand dollars, payable on demand. On the seventh day of June, 1888, said Showalter, for a valuable consideration, assigned said note and mortgage to the plaintiff. Charles H. Berry, the mortgagor, was during his life a resident of the state of Indiana; and the mortgagee, Samuel Showalter, has been a resident of the same state for the past twenty years. The said mortgage was duly acknowledged, and was filed for record on the twenty-sixth day of September, 1873. No question is made as to the recording of the mortgage. On the third day of October, 1873, while Charles H. Berry was still owner of the said real estate, he died intestate, leaving the defendants Sarah Gilbert, Edward Gilbert and Francis Berry as his only heirs. Sarah and Edward Gilbert were residents of the state of Indiana for fifteen years, and the defendant Francis Berry was a resident of the state of California for fourteen years, prior to the commencement of the suit. The facts upon which the defendants rely to defeat the foreclosure of the mortgage are based upon a suit in attachment which was commenced in the Carroll county district court by one A. S. Mount against said Berry, on the eleventh day of July, 1873, upon a money demand. An attachment was issued on the same day, and levied upon the land in controversy. Service was had by publication, and on the thirtieth day of September, 1873, judgment was rendered; and on the seventh day of October, 1873, an execution was issued, upon which the land was sold by the sheriff to one William Bray. Bray conveyed the said real estate to other parties, and the defendants Franklin K. Ingledue and William Ingledue claim title to the said southeast quarter of section 35 under and by virtue of the said attachment proceedings, sheriff's sale and deed to William Bray. Both of said quarter sections were purchased by said Bray, and the defendant Leet claims title to the said northeast quarter of section 36 as a remote grantee of Bray. He also claims title

by virtue of a tax sale, and a tax deed made in pursuance of the sale, which deed was made and executed on the twenty-sixth day of January, 1878.

We will first dispose of the material question pertaining to the validity of the proceedings in the attachment suit. It is distinctly averred in the petition that Charles H. Berry had no actual notice that the land in controversy had been attached by his creditors. The proceeding was, therefore, strictly *in rem*. A great many objections are made to these proceedings by counsel for the plaintiff. We need not set out nor discuss them, and will confine ourselves to a determination of what we regard as the one vital question.

It is distinctly averred in the petition that the execution in the attachment proceeding was issued on the seventh day of October, 1873, and that

1. EXECUTION:
issuance after
death of judg-
ment debtor:
sale void.

Charles H. Berry, the owner of the land, died on the third day of that month, four days before the execution was issued.

These facts necessarily involve the validity of a sheriff's sale of land made upon an execution issued after the death of the execution defendant. It is provided by section 3133 of the Code that "the death of part only of the defendants shall not prevent execution being issued, which, however, shall operate alone on the survivors, and their property." This provision of the statute plainly implies that an execution issued after the death of a defendant shall not operate on him, or his property; and this court has held that sales based on such executions are void. And the fact that the property levied on under the execution was already held by the sheriff, by writ of attachment levied before the death of the judgment debtor, will not affect the rule. In *Welch v. Battern*, 47 Iowa, 147, and in *Boyle v. Maroney*, 73 Iowa, 70, it is held that the right of a judgment creditor to issue an execution against the property of his debtor terminates with the death of the debtor, and that a sale and deed made in pursuance thereof are void. It is insisted by counsel for appellee

that this rule has no application to an execution on a judgment *in rem*. Whatever there may be in the way of authority in support of the position, we think that under our statute there can be no escape from the conclusion that no execution issued after the death of a defendant shall have any operative force against his property. And in the case of *Welch v. Battarn, supra*, it appears that the service of process in the action was made upon the defendant by publication. That being the fact, the judgment was not personal, but *in rem*. And we may say, further, that we can see no reason why there should be any distinction between an execution on a personal judgment and one *in rem*. It is lawful to seize the property of a non-resident without actual notice, and upon service by publication, because such a proceeding is authorized by our laws. But no authority is given to issue execution after the death of the non-resident. The rights of his representatives should be regarded the same as those of the representatives of any other deceased judgment defendant.

Some question is made by counsel as to the manner in which the death of Berry is averred in the petition. It is urged that the averment of the death of Berry is not made in connection with the averment of the date of the execution. But both facts are distinctly averred, and the execution is attached as an exhibit, which shows the date of its issuance; and in the tenth paragraph of the petition the averment of the death of Berry, and the date thereof, is repeated, and that he did not appear in the action,—was served by publication only,—and “that by reason of the facts stated herein, and shown by said exhibits, said judgment, levy, execution, sale and sheriff’s deed were and are totally void. * * *” In the demurrer filed by the defendants William L. and F. K. Ingledue, it is stated “that it further appears in said petition and exhibits thereto that said Charles H. Berry died intestate, while a resident of the state of Indiana, on October 3, 1878.” It appears to us that the facts of the death of Berry,

and the date thereof, were in the case for all they were worth ; that the pleadings and exhibits distinctly presented the question as to the effect of the issuance of the execution after his death; and we cannot dispose of the appeal without regard to that feature of the case. And if, as we have held and now hold, the sheriff's sale was void, his deed conferred no title upon the purchaser, nor his grantees. The execution and sale being void, the judgment *in rem* remained the same as if no execution had been issued. The land having been

2. ATTACHMENT
of land : judgment : void
sale : lien : duration.

attached before the mortgage was filed for record, the attachment was the prior lien; and, under section 2882 of the Code, the lien continued for ten years from the date of the judgment. The lien of the judgment ceased to be a lien on the third day of September, 1883,—ten years after its rendition. It follows that the mortgage is the prior lien.

Some claim is made that the action is barred by the statute of limitations. We do not think this claim can be sustained. So far as the mortgagor and his heirs are concerned, the mortgagor having been at all times a non-resident of this state, the statute of limitations of this state did not at any time commence to run in their favor, as in *Savage v. Scott*, 45 Iowa, 130; and it does not appear that the action is barred by the laws of the states of which they have been resident. Aside from this, no personal claim is made against them, and they do not appear to the action. The defendants who hold under the void sheriff's sale and deed may possibly be held to be invested with sufficient color of title or claim of right to rely upon the statute of limitations; but it does not appear that they have been in adverse possession of the land for ten years, which is necessary to authorize them to rely on the limitation provided by law.

We do not discover any ground for holding that the foreclosure of the mortgage can be successfully questioned by reason of the attachment suit, and the

Bull v. Gilbert.

judgment execution, and sheriff's sale; and we here repeat that we regard it not only unnecessary, but improper, to discuss the other objections made to the attachment proceedings. Having found that the deed made in pursuance thereof is void, it is an end of the inquiry.

II. The foregoing examination of the case fixes the rights of the parties as to the said southwest quarter of section 35. Other questions are necessary to be considered, as to the rights of the defendant William Leet in the said northeast quarter of section 36. It appears from the averments of the petition, and other facts of record in the case, that said quarter section was on the sixth day of October, 1873, sold by the treasurer of Carroll county to one Bangs for the delinquent taxes of 1872, and that said treasurer made a tax deed to said Bangs on the twenty-sixth day of January, 1878. Leet claims title to the land under this tax deed, and under a decree quieting his title, in which proceedings the said Showalter, who then owned the mortgage in suit, was made a party defendant. We do not think it necessary to discuss the objections made by counsel for appellant to said decree. We think that the rights of the parties are fixed and determined by the tax deed. The petition contains the following averment: "(14) That said defendant, William Leet, has no other title to said land, or interest in it, than such as is founded upon and derived through the respective proceedings and deeds hereto set out, except that said William Leet, by tenants, has been in the actual possession of said land for more than five years before the commencement of this action, and that neither said Berry, Bray nor Showalter was ever in actual possession of said land."

Some question is made by counsel for appellant as to whether the pleadings and exhibits show that Leet holds as a grantee under the Bangs tax title. We think that there is sufficient in the record to show that

3. Tax sale and deed: defective notice to redeem: cured by time as against prior mortgage.

Bull v. Gilbert.

fact, and we will proceed to examine the appellant's objections to that title. It is claimed that the proof of publication was defective. This action was brought to foreclose the mortgage more than five years after the tax deed was made and recorded, and it is admitted that Leet, by his tenants, had been in actual possession of the land for more than five years before the commencement of the suit. We think that any defect in the proof of service of notice of expiration of redemption has been cured by the five years' limitation provided by section 902 of the Code, and that under the rulings of this court in *Trulock v. Bentley*, 67 Iowa, 602; *Grove v. Benedict*, 69 Iowa, 346; and *Bolin v. Francis*, 72 Iowa, 619, the title of the defendant Leet is perfect, and unassailable. Counsel for appellant has made an ingenious argument upon this feature of the case, in which he claims that the five years' limitation provided for in section 902 of the Code is not applicable as a defense in an action to foreclose a mortgage, and that it is limited to an "action for the recovery of real property sold for the non-payment of taxes." It is true that section of the Code contains the language above quoted. But we do not think a fair construction of the statute demands that the limitation should be available to the holder of the tax title only in actions for recovery of real property, nor that his rights should be held to depend on the form of the action in which it is asserted. A title based upon a tax sale and deed is not derivative. It is a breaking up of all titles. When made in conformity with the requirements of the law, it is available not only against the owner of the patent title, but against all liens based upon the patent title.

We think the foregoing discussion disposes of every material question in the case. The decree of the district court, so far as the land claimed by the defendant Leet is concerned, is affirmed; and, as to the land claimed by F. K. and William Ingledue, the decree is

REVERSED.

BEERE V. BEERE *et al.*

79	555
113	639
79	555
134	79

Husband and Wife: MARITAL RIGHTS: CONVEYANCE IN FRAUD OF: EVIDENCE. The defendants are mother and son. The son having got plaintiff with child, and fearing that he would be obliged to marry her to avoid a prosecution for seduction, secretly conveyed all his property, consisting of chattels only, to his mother. The bill of sale was made without the knowledge of the mother, and expressed a consideration of "one dollar and love and affection," and was left with the son's attorney, to be delivered, as it would seem, in case the son married the plaintiff; otherwise not. The third day after it was executed the son did marry the plaintiff, and the next day he abandoned her and absconded, and the day after that the bill of sale was delivered to the mother. The mother knew beforehand of the son's trouble with plaintiff; and when she received the bill of sale she knew that he had married plaintiff and had absconded. Although there was some evidence tending to show that the real consideration for the bill was a debt owing by the son to the mother, the existence of such debt is not satisfactorily established, and upon consideration of all the evidence (see opinion), *held* that the bill of sale was made with the fraudulent intent to defeat plaintiff of her marital rights, and that the mother was charged with notice of such intent when it took effect as between herself and her son,—that is, when it was delivered to her and accepted by her,—and that she was properly adjudged to hold the property in trust for the plaintiff. (Compare *Gainor v. Gainor*, 26 Iowa, 337.)

Appeal from Des Moines District Court.—HON.
CHARLES H. PHELPS, Judge.

FILED, FEBRUARY 11, 1890.

ACTION to avoid a sale, and declare a trust. Judgment for plaintiff, and defendants appeal.

Dodge & Dodge, for appellants.

A. H. Stutsman and *D. Y. Overton*, for appellee.

GRANGER, J.—I. The defendants are mother and son. The plaintiff and the defendant Henry Beere are husband and wife, and were married on the fifteenth day of November, 1887. Soon after the marriage there

was born to them a child, the fruits of antenuptial intercourse. The day after the marriage, November sixteenth, the husband abandoned his wife, and the abandonment is continued. On the twelfth day of November, 1887, the husband executed a bill of sale of all his property, in value from one thousand to fifteen hundred dollars, to his mother, and left it with third parties. This conveyance was without the knowledge of the mother, and was delivered to her on the seventeenth day of November, after her son had married the plaintiff, abandoned her and absconded. The consideration expressed in the bill of sale is "one dollar and love and affection." The conveyance was made while the marriage contract was pending, but a question is made in argument as to the marriage being really contemplated. These facts are undisputed. Questions involved in dispute will be noticed in our consideration of the case.

It is plaintiff's theory of the case that the transfer of the property was made while under promise and in contemplation of marriage, and in fraud of her rights, and that the holding by Anna Beere should be in trust for her. With the facts as above stated, little doubt could well be entertained as to the validity of her claim. Some additional disputed facts must be determined, and aid in reaching a correct result. Appellant's claim is that the transfer of the property to the mother was not for the consideration expressed in the bill of sale, but that it was in payment of an indebtedness due from Henry to his mother, of an amount equal to or greater than the value of the property transferred, and that in the transfer there was no fraudulent purpose. As to the fact of indebtedness, we may say that the testimony leaves the case in considerable doubt; but we think it unnecessary to decide that point, as, conceding the indebtedness, if the transfer was fraudulent as to the plaintiff, it cannot be sustained. It seems to us that no serious question exists as to the purpose of Henry in making the transfer. He had for years resided on the farm of and with his mother, and worked the farm. His property was on the farm, and consisted of personal property.

Beere v. Beere.

The indebtedness claimed by his mother was in part for rent of the farm, and of quite long standing. He had never settled with his mother, and when he made the conveyance he did not know the amount of his indebtedness to her, nor could he reasonably approximate it. It is quite clear that when he made the conveyance he intended to avoid a matrimonial alliance with the plaintiff, if he could, as after making the bill of sale, and depositing it with a third party, he went to the plaintiff, and told her he was not going to marry her. This led to his arrest on a charge of seduction, to avoid which he married her, and at once violated his covenant. For some unexplained reason, although he had talked with his mother, and, in harmony with an honest purpose, she should have known the fact if she was to receive his property in payment of her claims, the intended conveyance is kept a secret from her; Henry only saying to her that she "would get a paper from Dodge." The marriage was repugnant to him. He surely did not intend to live with the plaintiff as his wife; and we think it equally plain that he did not intend that the plaintiff, whether she became his wife or not, should have his property, or any part of it, for her support, or that of their child, and in the fulfillment of such a purpose he made the bill of sale. The secrecy of the affair, with the surrounding inducements, leads one to believe that the attempt was a mere venture,—a playing fast or loose, as emergencies might require; to be a sale if necessary to escape the plaintiff, otherwise not.

But it is said by appellants, and the case may be so treated, that a fraudulent purpose on the part of Henry Beere is not enough; that Anna Beere must have participated in the fraud. The case, as to her, is very singular, conceding the indebtedness to her. She had never asked for payment, and did not expect it. The last time she saw Henry, he told her he was in a "girl scrape," and was going to leave the state. She says: "I suspected what the matter was." Now, on the seventeenth of November, which was after the marriage, she received the bill of sale. She says it was sent to

Beere v. Beere.

her, and on that day, but after she received the instrument, she learned of Henry's marriage. She says she had not requested a bill of sale, and had no knowledge of it, till it came to her that day. We think it important to have clearly in mind just the situation of the transaction at that time. The instrument expressed as a consideration "one dollar and love and affection." The instrument, on its face, purported a gift; and her only information as to Henry's intent in making it was what appeared on its face. We have read the abstract with the point in view; and, if it anywhere discloses when or how she has ever learned that Henry designed the bill of sale for any other purpose than that expressed therein, we have not discovered it. It does appear in the sworn statement of Mr. Dodge, who took the acknowledgment, that Henry said, when he made the instrument, that the real consideration was his indebtedness to his mother; but she was not there, and knew nothing of it. Before the bill of sale would be valid for the purpose intended by Henry, the mother must at least have known and concurred in the purpose. Now, when she received the bill of sale, on the seventeenth, what was her situation? She knew that Henry was in a "girl scrape;" that he had left the state because of it; and that he had given to her every dollar of his property just on the eve of his departure, and she must have understood that it was done with remarkable secrecy, not even making her, with her maternal and pecuniary interest, his confidant. With proper allowance for her inexperience, as a woman, we must believe that she then knew that the transfer to her was for a fraudulent purpose. But later the same day, she knew more,—that Henry was married to the plaintiff; that the "girl" Henry had referred to was his wife; that he had abandoned her. And she must then have better known the purpose of Henry in secretly conveying his property to her for "love and affection." Now, she could not agree to Henry's purpose,—conceding it to be to convey the property to pay his debts,—until she knew of it, and it is clearly apparent that she did not know of it at

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this time. It is then a case of a voluntary transfer of property in contemplation, and under promise, of marriage. Such a transfer is fraudulent. *Gainor v. Gainor*, 26 Iowa, 337; *Way v. Way*, 31 N. W. Rep. (Wis.) 15. If we are not mistaken in the record, we see no way of escaping this conclusion. If the minds of the parties were met upon the intent, as claimed by appellants, it must have been after this; and the acceptance by the mother must have been with full knowledge of the fraudulent purpose, and in aid of it. Viewed in this light, it is a stronger case for plaintiff than that of *Way v. Way*, *supra*. But the entire absence of testimony showing that the mother ever had information of Henry's intent, so that she might concur therein, renders it unnecessary to consider this latter view of the question. The mother, in her testimony, repeatedly says that she took the bill of sale in payment of the debt; that Henry gave it to her to pay her, etc. But still there is the absence of proof as to how or when she ever learned of his purpose.

As taking this case outside of the rule above cited, as to conveyances made pending the marriage treaty, and in contemplation of marriage, appellants say that the fact that Henry, after making the bill of sale, went to the plaintiff, and told her he was not going to marry her, shows that he did not, when making the conveyance, "contemplate marriage." The position, from a legal view, is open to criticism, but we need not discuss it. The inference drawn from the facts is too broad. He was under promise of marriage, with a day fixed. He did marry her. The most that can be said is that he designed to escape marriage, if he could; but when he ever formed such a purpose is left to conjecture,—too much so to justify a finding of the fact as claimed.

II. It is next urged that the district court fixed the value of the property too high, and that the judgment is consequently too great, if it is to stand. We have examined the record with care in this respect, and think the judgment of the court below is fully sustained.

AFFIRMED.

HANKS V. BROWN.

1. **Gambling Contract: WHAT IS NOT.** Defendant gave his note for one hundred and fifty dollars for fifteen bushels of Bohemian oats, and for an interest in an agreement, whereby thirty bushels of the oats raised from those purchased were to be sold for him at ten dollars per bushel. This agreement was definite and free from contingency, but it embraced a clause to the effect that the transaction was of a speculative character, and not based upon the real value of the grain. *Held* that it was not a gambling contract within the meaning of section 4029 of the Code, and that recovery upon the note could not be defeated on that ground.
2. ———: **STATUTE STRICTLY CONSTRUED.** Section 4029 of the Code, defining and making void gambling contracts, being a criminal statute, cannot be extended to transactions which are not within the letter of it, although within its reason and policy. (See opinion for citations.)
3. **Contracts: CONSTRUCTION: DUTY OF COURT.** Where there is no dispute as to the facts involved in the making of a written contract in suit, it is the duty of the court to determine the questions of law.
4. **Appeal: QUESTION RAISED BY APPELLEE.** A party who does not appeal cannot be heard in this court to raise objections to the rulings of the trial court.

Appeal from Madison District Court.—HON. J. H. HENDERSON, Judge.

FILED, FEBRUARY 11, 1890.

ACTION on a promissory note made by defendant Brown, and indorsed by its payee, the defendant Hayden. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant Brown appeals.

Steele, Leonard & Wainwright, for appellant.

Eli Wilkin, for appellee.

ROBINSON, J.—I. The note in suit was given on the thirteenth day of December, 1887, for the sum of one hundred and fifty dollars, and interest thereon at the rate of ten per cent. per annum. It was payable on or before the first day of January, 1889, to N. A. Hayden or bearer, and was purchased by plaintiff about the twenty-third day of December, 1887, for the sum of one hundred and thirty-five dollars. Appellant claims that it is a part of a gaming contract, and, therefore, void, also that the transaction of which it was a part was against public policy; that plaintiff is not an innocent purchaser for value; and that it is, therefore, void in his hands.

The note was given under circumstances substantially as follows: Two or three weeks before it was given, N. A. Hayden told appellant that he had raised over one hundred bushels of Bohemian oats from twenty bushels he had purchased, and would make from them twelve hundred or fourteen hundred dollars, and advised appellant to purchase some. It was finally agreed that appellant should purchase fifteen bushels of the oats, at ten dollars per bushel, for which he should give his note. In addition to the oats, he was to have the benefit of an agreement by virtue of which thirty bushels of oats were to be sold for him, at ten dollars per bushel. Said agreement was as follows:

“No. 39. Capital stock, \$100,000. Home Office: Napoleon, O. A bond from the Crawford, Henry and Williams County Seed Company. Incorporated under the laws of Ohio, September 1, 1885, for the production and sale of grain and seed. It is agreed and understood by and between the party named in this bond and said company that the transaction covered by this obligation is of a speculative character, and is not based upon the real value of the grain. Know all men by these presents, that the Crawford, Henry and Williams County Seed Company do hereby agree to sell sixty bushels of Bohemian oats for Mr. Charles Hayden, at

Hanks v. Brown.

ten dollars per bushel, less twenty-five per cent. commission, on or before November 1, 1888. In testimony whereof the said Crawford, Henry and Williams County Seed Company has caused this bond to be signed and sealed by the secretary of said company, this twenty-second day of November, 1887. This company will not be held responsible for any outside contracts made by agents, other than those expressed on face of this bond.

“THE CRAWFORD, HENRY &

WILLIAMS CO. SEED CO.,

“[L. s.] Per O. H. BRASINGTON, Secretary.”

The note in suit was given, and appellant became entitled to have sold, under the terms of the so-called “bond,” thirty bushels of oats. In March, 1888, the oats were delivered to him. The details of the agreement need not be set out more fully, although some representations were made to appellant in regard to the prospective profits of the transaction, which probably influenced him. He became a party to the agreement, knowing and understanding all its provisions, and knowing that there was no market for Bohemian oats at the price stated. In making it he relied upon the so-called “bond.” He raised about one hundred bushels of oats, but none have been sold under the agreement.

Appellant complains of the refusal of the court to give to the jury certain instructions, defining and explaining gambling contracts. The court charged the jury that the note in suit was fraudulent, and against public policy, and that plaintiff could not recover thereon, unless he was an innocent purchaser for value; but did not authorize them to find that the note was void, as a gambling contract. Section 4029 of the Code is as follows: “All promises, agreements, notes, bills, bonds or other contracts, mortgages or other securities, when the whole or any part of the consideration thereof is for money or other valuable thing, won or lost, staked or bet, at or upon any game of any kind, or on any wager, are absolutely void and of no effect.” Appellant contends that the note in suit falls within the provisions of that section; that the obligation of the seed

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company is a wagering contract, depending upon "the happening or not happening of an uncertain event." The obligation contains a statement that it is of a speculative character, and is not based upon the real value of the grain, it is true, but that would not make it a wagering contract. A careful examination of the entire instrument will show that it does not rest upon any condition. The seed company agrees to sell a specified quantity of Bohemian oats, for a person named, on terms fully given, on or before a date fixed. The agreement does not depend upon the raising of the oats, nor the finding of a purchaser. The obligation of the company is fixed and definite, and there is nothing in the record to show that it does not express the real agreement, nor that it was designed as a cover for a transaction not fully disclosed. Appellant relied upon it to provide means for the payment of his note two months before it should become due, and a profit in addition. What the motive of the company was in becoming a party to it is not shown, but, in terms, it became liable for the fulfillment of its provisions. The agreement is not, therefore, a gambling contract, within the meaning of the section of the Code quoted. See *Matson v. Blossom*, 2 N. Y. Supp. 551. It is not claimed that it was affected by chapter 78, Acts Twenty-second General Assembly.

II. It is said that the agreement is within the spirit and intent of that section. But criminal statutes are not elastic, and cannot be made to include cases without the letter, although within the reason and policy, of the law. *State v. Lovell*, 23 Iowa, 304. See, also, *Bond v. Railway Co.*, 67 Iowa, 714; *Boughner v. Meyer*, 5 Colo. 71; *Shaw v. Clark*, 49 Mich. 385, 13 N. W. Rep. 786; *Sondheim v. Gilbert*, 18 N. E. Rep. 690.

III. Appellant contends that the court erred in not requiring the jury to determine the real character of the transaction in controversy. But there was no dispute as to the facts involved in the making of the note and bond, and it

2. —: statute
strictly con-
strued.

3. CONTRACTS:
construction:
duty of court.

 RAPPLEYE v. Cook.

was the duty of the court to determine the questions of law. It was not a case where different minds might honestly draw different conclusions from admitted facts.

IV. Appellee complains in argument of so much of the charge to the jury as instructed them that the note in suit was against public policy and fraudulent, as between the parties thereto, and that plaintiff could not recover unless he was an innocent purchaser for value. Appellant makes no objection to that portion of the charge and, since appellee did not appeal, the question as to its correctness is not properly before us, and is not determined. The judgment of the district court is

AFFIRMED.

 RAPPLEYE v. COOK.

1. **Evidence : ERROR CURED BY SUBSEQUENT RECORD.** Error in refusing to strike out immaterial testimony is no ground for a reversal, where it appears from other testimony in the case and the finding of the court thereon that the error worked no prejudice to the appellant.
2. **Appeal : NO REVERSAL FOR TRIFLING ERROR IN AMOUNT.** This court will not reverse a judgment and remand a cause for new trial on the mere ground that the judgment is for a sum a trifle too large, and the correction cannot be made in this court because the record leaves in doubt what the exact amount should be. (Compare *Watson v. Moeller*, 63 Iowa, 161, and *Machine Co. v. Haven*, 65 Iowa, 359.)

Appeal from Polk District Court.—HON. A. W. WILKINSON, Judge.

FILED, FEBRUARY 11, 1890.

ACTION upon notes, and an open account. There was a judgment for plaintiff for a part of the amount claimed; and from a judgment of the court favorable to the defendant on certain items the plaintiff appeals.

N. B. Raymond, for appellant.

Baylies & Baylies, for appellee.

GRANGER, J.—Plaintiff is the assignee of Young Bros., who were dealers in agricultural machinery at Des Moines, Iowa. Defendant was engaged in the same business at Colfax, Iowa, and purchased, and also received for sale on commission, machinery and fixtures from Young Bros. The account sued on originated in these transactions, and among the items of account is one for an Esterly Harvester, known by its number, 3,766. This harvester, with a truck, was furnished to defendant for sale, and by Young Bros. charged to the defendant at one hundred and eighty dollars, and the truck at fifteen dollars. The defendant, in his answer, admits the receipt of the harvester and truck, and seeks to avoid liability therefor by alleging its return to Young Bros. At the trial the following testimony was given by the defendant. “*Question.* Mr. Cook, you may state what you know about the harvester that is in the possession of Mr. Slaughter. Did that come from Young Bros.? *Answer.* Yes, sir. When it came it was not all there. It was a second-hand machine, and they wrote me it was the best they had. It was not all there, and they had to send to the shops to get repairs for it. *Q.* What did you do with the machine when you got it? *A.* I had the machine sold, but when it came they would not take it because it was not new.” Plaintiff moved to strike out the questions and answers, for the reason that the only issue as to the machine was as to its return. The court refused to strike the testimony, and the ruling is assigned as error.

I. We think the statement as to the issue correct; and that some parts of the answers are immaterial under that issue. The questions were such that the witness might have given testimony tending to show a return of the machine; but the witness, as is often the case, made immaterial statements. Referring to the abstract, we find that the next statement of the witness is, “machine eventually went back to Young Bros.’ hands,” followed by other

1. EVIDENCE :
error cured
by subse-
quent record.

The State v. Bowman.

testimony corroborative of the fact. Taking the testimony in the case, and the finding of the court, and we may say that it appears satisfactorily that no prejudice could have resulted from the testimony. The testimony could only have affected the value of the machine; and the court, in its finding, fixes its value as charged in the account. It must have found that the machine was returned.

II. As a part of plaintiff's claim, there is a freight account, aggregating some forty-one dollars, as to which there is a dispute; and it seems quite apparent that the amount allowed by the court is a trifle too large. But the exact amount to be allowed is a matter of considerable doubt. In a law case we are not to consider the evidence to fix the amount. The deficiency, as we see it, is too trifling to justify a reversal of the case, and a new trial. It is not a matter of substantial importance to either party. For nominal consideration, a judgment will not be reversed. *Machine Co. v. Haven*, 65 Iowa, 359; *Watson v. Moeller*, 63 Iowa, 161. This point has been frequently ruled.

III. Several other questions are presented in argument; and, although points are claimed by appellant as practically without conflict of evidence, our examination leads to the conclusion that in each there is such conflict that the finding of the district court is conclusive. There are no grounds for a reversal of the judgment, and it is

AFFIRMED.

THE STATE V. BOWMAN *et al.*

Liquor Nuisance: SALES IN ORIGINAL, IMPORTED PACKAGES: GOOD FAITH OF DEFENDANT. It is a violation of the laws of this state to sell intoxicating liquors without a proper license, though the sales are made only in original, unbroken, imported packages (see cases cited in opinion); and one who violates an injunction by the sale of such liquors cannot escape the penalty on the ground that he in good faith believed that such sales were not a violation of the law.

79	566
85	334
79	566
104	56

The State v. Bowman.

Appeal from Marshall District Court.—HON. JOHN L. STEVENS, Judge.

FILED, FEBRUARY 11, 1890.

THIS is an action for an injunction to restrain and enjoin the defendants from maintaining and carrying on an alleged nuisance by the illegal sale of intoxicating liquors. A temporary injunction was ordered, and, pending the action, an information was filed charging the defendants with violating the same. The cause was tried upon its merits, and at the same time the information for violation of the injunction was heard. The injunction was made perpetual, and the defendant John A. Bowman was ordered to pay a fine of five hundred dollars for the violation of the injunction. The defendants appeal.

Parker & Nichols and *Blum & Blum*, for appellants.

W. W. Miller, County Attorney, for the State.

ROTHROCK, C. J.—I. It appears from the pleadings and evidence that the liquor sold by defendants was purchased in Chicago, Illinois; that it was shipped to Marshalltown, Iowa, in boxes; and that the boxes, with their contents, were sold without any change being made in the boxes or packages. The defendants claim that, as the sales were made in the original packages, just as they were when imported into the state, the defendants were not guilty of the violation of any law. This question was considered by this court, and determined in the case of *Collins v. Hills*, 77 Iowa, 181, and in *Leisey v. Hardin*, 78 Iowa, 286, and *State v. Zimmerman*, 78 Iowa, 614. We discover no ground for receding from the rule announced in the cited cases.

II. It is urged in behalf of the defendant John A. Bowman that he ought not to have been held guilty of violating the temporary injunction, because he believed that he violated no law in the sale of liquor in original

The State v. Griffin.

packages. We do not think that this is any excuse for violating the injunction by making sales during the pendency of the action. The evidence shows that he was engaged in quite an extensive traffic in liquors, in the way above indicated, and he knew that the device adopted by putting each bottle in a separate box was claimed to be a violation of law, the same as selling in any other way. If he preferred to take his chances of making the sales, he ought not to complain of the penalties.

AFFIRMED.

THE STATE V. GRIFFIN.

1. **Larceny: INDICTMENT: SUFFICIENCY.** The indictment in this case alleged that defendant, at a named time and place, "took, stole and carried away one horse, of the value of one hundred and fifty dollars, the said property belonging to J. W.," etc. *Held* that it was not bad on the ground that it failed to state that the horse was "feloniously" taken,—for to charge the stealing of property of such value is to charge a felony; nor on the ground that it did not charge that W. was the owner of the horse when taken,—it being sufficiently clear on that point; nor on the ground that it did not charge the intent of the defendant to convert the horse to his own use,—the averment that he "took, stole and carried away" the horse being sufficient to show the intent.
2. **Practice: TRIAL: IRREGULARITIES: NO PREJUDICE SHOWN.** The facts that during the trial of this case the judge called an attorney to preside while he absented himself for a time, and that the attorney so presiding interrupted defendant's counsel while addressing the jury, and that there was confusion in the court room during this time, will not justify a reversal, where it does not appear that such irregularities worked any prejudice to defendant.

Appeal from Warren District Court.—HON. O. B. AYRES, Judge.

FILED, FEBRUARY 11, 1890.

DEFENDANT was indicted, tried and convicted of the crime of larceny, and he appeals.

79	568
95	569
79	568
106	488
79	568
107	709
79	568
126	323
79	568
132	297
79	568
140	448

Powell & McGarry and *H. McNeil*, for appellant.

John Y. Stone, Attorney General, for the State.

ROTHROCK, C. J.—I. The body of the indictment is in these words: “The said William H. Griffin, on the ninth day of August, A. D. 1886, in the
1. LARCENY :
indictment :
sufficiency. county of Warren aforesaid, took, stole and carried away one horse of the value of one hundred and fifty dollars, the said property belonging to one James Wheeler, contrary to the form of the statute in such case made and provided, against the peace and dignity of the state of Iowa.” It is claimed by counsel for defendant that the indictment is fatally defective, in that it is not alleged therein that the horse was feloniously taken by the defendant. It is true that under our practice it is usually averred that the act was feloniously done. But we do not think such an averment is essential to the validity of an indictment. When, as in this indictment, it is alleged that the defendant “stole” the horse, and that he was of the value of one hundred and fifty dollars, it is as plain and unmistakable an averment that the act was “feloniously” done as if that word had been used. It is further claimed that the indictment is defective because it does not charge that Wheeler was the owner of the horse when he was stolen. This objection is without merit. It is founded on the fact that the indictment does not contain the words “then and there” before the averment of ownership. This was not necessary. To the common understanding, it is plain that the averment means that Wheeler owned the horse when he was stolen. It is further urged that the indictment does not charge the intent to convert the horse to the defendant’s use, and deprive the owner thereof. The averment that the defendant “took, stole and carried away” the animal was sufficient to show the *animus* with which the act was done.

II. There is no real dispute on the facts of the case. The defendant went to a barn in Warren county

The State v. Griffin.

on the night of the ninth day of August, 1886, and took the horse, and rode or led him to the city of Des Moines, where he arrived at about seven o'clock the next morning. He put him in a livery or sale stable, and offered to sell him for two hundred dollars. The proprietor of the stable suspected that the horse was stolen, and called in an officer, who pretended to buy the animal of defendant. The sale was made at an agreed consideration of one hundred and fifty dollars; and the officer went with defendant to get the money to pay him, and took him to police headquarters and locked him up. He told the parties in Des Moines that he lived near Fort Dodge; that he had raised the horse, and that he had stayed with his uncle, some eight miles from the city, during the previous night. The defense was insanity. The appeal is presented to us upon a full transcript of the evidence, and we have carefully examined it, and have to say that there was an entire failure to show that the defendant was of unsound mind. The court gave the defendant the widest latitude in the trial of the case. Every trait of character showing unusual acts of the defendant was allowed to go in evidence, and there is no ground for complaint of the charge of the court to the jury. It is urged by appellant that the court erred in not explaining to the jury what is meant by the preponderance of evidence, as applied to defense of insanity. We think the charge was sufficient in that respect, and do not deem it necessary to set out the instructions complained of.

III. During part of the time while counsel were engaged in the argument of the case to the jury, the presiding judge called an attorney to preside while he (the judge) absented himself from the court room. Counsel for defendant, in the motion for a new trial, set up as one ground therefor that the attorney was guilty of misconduct during the absence of the judge by interrupting defendant's counsel during his argument, and that there was great disorder in the court room at the

2. PRACTICE.
trial: irregularities: no
prejudice
shown.

Rainwater v. Hummell.

same time. We do not think that the showing of misconduct and disorder was sufficient to require a new trial on that account. The interruption of counsel was of a trivial character, and we cannot say that the noise and confusion in the court room was prejudicial to defendant. We discover no grounds for a reversal of the judgment, and unite in the conclusion that it should be

AFFIRMED.

RAINWATER V. HUMMELL.

79	571
128	503

1. **Tender: ADMISSION OF LIABILITY.** To make a tender of money to a claimant is an admission of liability to the amount of the tender. (See opinion for citations.)
2. ———: **DEPOSIT IN BANK WITHOUT NOTICE.** Where defendant tendered to plaintiff money which he was owing him, and plaintiff refused it, defendant was not discharged from liability by depositing the money in a bank to plaintiff's credit, without notifying him thereof until after the bank had failed.
3. ———: **OF NO AVAIL IF NOT KEPT GOOD.** One who makes a tender which is refused, and who fails to keep it good by bringing the money into court when sued on the demand, and refuses to pay the sum when afterwards demanded, loses the benefit of the tender.

Appeal from Harrison District Court.—HON. SCOTT M. LADD, Judge.

FILED, FEBRUARY 11, 1890.

ACTION against an administrator and the sureties on his bond, to recover the amount of a balance of the distributive share of an heir of the intestate, which the administrator was, by order of the court of probate, required to pay. The cause was tried to the court without a jury, and judgment rendered for plaintiff against the administrator, and for the sureties. The administrator appeals.

Jos. H. Smith, for appellant.

John A. Berry, for appellee.

BECK, J.—I. The defendants in their answer admit that the administrator was ordered by the court of probate, upon a report made by him, to pay to plaintiff the sum claimed in this action; that the administrator tendered to plaintiff the sum he was ordered to pay plaintiff, which was refused; and thereupon the administrator deposited the money in a bank, to the credit of plaintiff, notifying him thereof; and that the bank failed, and plaintiff lost his money, by reason of his failure to accept it when tendered. The plaintiff, in a reply, denies the allegations of the answer.

II. The evidence tends to establish the tender as pleaded by defendant. The court below, we infer, found that the tender was made. This finding is sufficiently supported by the evidence; at least, is so supported that we cannot disturb it, as being against the evidence. The district court appears to have based its judgment upon this finding, as it rendered judgment against the administrator, and found for the sureties, concluding that defendant, by the tender, admitted the indebtedness, and that his sureties were not bound by that admission. The correctness of this conclusion as to the sureties cannot be questioned in this appeal, as plaintiff does not appeal, and the administrator has not attempted to make them parties to this appeal, if he could have done so. The conclusion of the district court that the effect of the tender was to establish the liability of the administrator cannot be doubted. *Babcock v. Harris*, 37 Iowa, 409; *Sheriff v. Hull*, 37 Iowa, 175; *Phelps v. Kathron*, 30 Iowa, 231; *Gray v. Graham*, 34 Iowa, 425.

III. The district court, we infer, found that plaintiff was not notified of the deposit of the money until after the failure of the bank; and that after the tender, and before the failure of the bank, he demanded the money of defendant, who failed to pay it, and gave him no information of the deposit in the bank. There was evidence authorizing the court below to so find. We will presume that

1. TENDER:
admission of
liability.

2. —: deposit
in bank with-
out notice.

Rainwater v. Hummell.

it did in fact so find. Defendant was not authorized to deposit money in a bank to plaintiff's credit, without his knowledge or consent, and without notice to him of the fact, and thus relieve himself of liability to plaintiff. Surely, in the absence of notice of the deposit until after the bank failed, defendant is liable as though no deposit had been made. We do not determine that he would not have been liable had he given such notice to plaintiff before the failure of the bank; that question is not before us.

IV. This proceeding is brought and prosecuted under Code, section 2435, which is in this language:

8. —: of no
avail if not
kept good. "If the executors fail to make payment of any kind in accordance with the order of the court, any person aggrieved by that failure may, on ten days' notice to the executors and their sureties, apply to the court for judgment against them on the bond of the executors. The court shall hear the application in a summary manner, and may render judgment against them on the bond for the amount of money directed to be paid, and costs, and issue execution against them therefor. If any of the obligors are not served, the same proceedings in relation to them may be had, with like effect as in an action by ordinary proceedings, under similar circumstances."

Counsel for defendant insist that the case does not fall under this statute, for the reason that defendant did not fail to make the payment; that he did make a tender of the sum due plaintiff, who failed to receive his money because he failed to accept the tender. But the defendant, by failing to keep the tender good by bringing the money into court to be disposed of as the court should direct, or by failing to pay the money when demanded, lost the benefit of the tender, which had no other effect than to afford evidence establishing defendant's indebtedness by reason of his default. His plea of tender admitted his indebtedness, and that the money had not been paid. The court was authorized to find he had failed to obey the order for payment to

Donover, Adm'r, v. Argo.

plaintiff, and upon such finding rightly rendered judgment against him, as authorized by the statute above quoted.

V. Counsel insist that the statute contemplates a judgment against the administrator and sureties, and the judgment is erroneous, in that it is not against the sureties as well as the administrator. But if this be an error, which we do not determine, it cannot be the ground of complaint of either plaintiff or defendant, for the sureties are not parties to this appeal. We could not reverse the cause, for the reason that the judgment does not run against them, and remand the case for another trial, in which the sureties could be held liable. These considerations lead us to the conclusion that the judgment of the district court ought to be

AFFIRMED.

79 574
110 97

DONOVER, Administrator, v. ARGO *et al.*

Estates of Decedents: DISCOVERY OF ASSETS: GIFT: EVIDENCE: ORDER. The defendants, who were the father and mother of the plaintiff's intestate, were cited, under section 2379 of the Code, to appear for examination as to the possession by them of assets belonging to the estate. Their testimony showed that the decedent died at their house, and that the night before he died he sold two horses to one P., who was the next day to give his notes for the price, to-wit, one note for one hundred and fifty dollars, and one for fifty dollars. He took one of the horses that night, and the next morning, the decedent having died during the night, he took the other horse and left with the father the notes which he was to give, and afterwards paid to the father the amount of the fifty-dollar note. The larger note and money the father admitted he still had, but he claimed that they belonged to his wife, pursuant to an oral direction of the son, that when the notes came in the morning they should be hers. *Held* that, as the intended gift, as alleged, was not consummated by possession during the life of the son, it was void, and the court properly ordered the defendants to deliver the property to the plaintiff; but a further order, that upon failure so to do they should be imprisoned, is modified so as to apply only to such of them as, having the power to deliver the property, shall refuse so to do.

Donover, Adm'r, v. Argo.

Appeal from Appanoose District Court.—HON. DELL STUART, Judge.

FILED, FEBRUARY 11, 1890.

PROCEEDINGS to discover assets belonging to an estate, and to compel their delivery. From a judgment requiring the defendants to deliver the property to the plaintiff they appeal.

Geo. D. Porter, for appellants.

T. M. Fee, for appellee.

GRANGER, J.—The defendants are husband and wife, and were the parents of James H. Argo, deceased, who is the plaintiff's intestate. The plaintiff, under the provisions of the Code, section 2379, obtained an order from the district court of Dallas county for the appearance of the defendants to answer, and, as a result of the examination, the district court found that William H. Argo held a note for one hundred and fifty dollars, and fifty dollars in money, which he wrongfully detained from the plaintiff as administrator of the estate of James Argo, deceased, under a claim that they belonged to the defendant Sarah Argo, and ordered them turned over immediately, or, at furthest, on demand of the administrator, and, on failure, that they be imprisoned until the order should be complied with. The question on appeal is as to the validity of the order. The examination involved inquiries as to other property as to which the district court made no order, and our investigation may be limited to the order as to the note and money.

As the order of the court was based on the statements made by the defendants at the examination, and our action is to determine the validity of the order, it is necessary, to an understanding of our ruling, that the statements as to the notes and money should appear.

Donover, Adm'r, v. Argo.

Some undisputed facts may, however, be stated as preliminary: "James H. Argo died at the home of his parents. The night before he died he owned and sold a span of colts to Mr. Potts, for which Potts was to give his notes, one for fifty dollars and one for one hundred and fifty dollars. Potts took one of the colts away that night, and was to give his notes, and take the other in the morning." In the morning he returned with the notes, and took the other colt, but before he returned James died, and the notes were delivered to his father. There is no question as to the attitude of William H. Argo at the time the order was made. He was examined, and admitted that he had the one hundred and fifty-dollar note, and had received fifty dollars in payment of the other note, and was holding the note and money for his wife, and also that he received the notes after the death of James.

The following are Mrs. Argo's answers under oath, at the examination, as to her ownership of the notes: "I did have a conversation with Will and my son's cousin about the Potts notes, and James said that 'he wanted mother to have them for his care.' He said I 'justly earned them, and more too.' He gave direction that when the notes came back in the morning that Bill should 'sign them over to ma.' That was his exact language, as far as I can remember. My husband has collected fifty dollars, and my husband has the one hundred and fifty-dollar note in his possession for me." The plaintiff neither took nor offered testimony in the case, except the answers of the defendants. The defendants, however, examined several witnesses upon the point of Mrs. Argo's ownership of the notes, but there is nothing to change the legal effect of Mrs. Argo's statements as to her rights.

The points urged by appellants are that the court, in making its order, acted without authority of law, and that the effect of the order is to deprive the defendants of property without due process of law. The argument proceeds upon the theory that there was an

Donover, Adm'r, v. Argo.

issue of fact to be determined, and says that no one can read the record and not come to the conclusion that the Argos claimed the property under an honest claim of right, and, this being so, the court acted without authority. In this respect we think there is a misapprehension of the question presented by the record. If this note and money are claimed by any one, it is by Mrs. Argo. The question in the case is, who is entitled to the possession of the note and money? The inquiry may, of course, incidentally involve the question of ownership, but the main question should be kept prominent, and not lost sight of, in considering other questions. We do not understand that appellants are claiming in this court that James Argo made a verbal will, which is the basis of Mrs. Argo's right to the property, but, to avoid any misapprehension in that respect, it may be well to say that she made no reference to such a will, nor does it appear that such a will is in existence; for, to be the basis of such a claim, it must be established in court. We, therefore, dismiss that feature of the case.

Now, let us take Mrs. Argo's statements, and look for any claim on her part to the property. She nowhere says it is her property, or that she has any claims to it, nor does she anywhere state facts from which a legal inference of ownership or claim can be drawn. She does speak of a gift, but she says, in effect, that it was unexecuted, and such a gift is not valid as against an administrator or others. *Willey v. Backus*, 52 Iowa, 401. When James talked of having the notes signed over to her, they were not in existence, and were not while he lived. She says she had no claim against him, and the transaction could not have been a payment. On what state of facts, then, can or does she claim a right to the possession of the property? She nowhere says, in any way, that she is entitled to the possession. The fact that she is contesting the order of the court is the only ground for inferring that she claims the possession. The order of the court seems to

Diamond v. Palmer.

have been made upon the admitted facts of the case, showing her not entitled to the property. We think, under the state of facts, the court did not err in making the order to turn over the property. This holding in no way conflicts with, nor extends, the rule as expressed in *Smyth v. Smyth*, 24 Iowa, 491, or *Rickman v. Stanton*, 32 Iowa, 134. The record shows that the property is in the possession of W. H. Argo, and the order provides for the imprisonment of defendants on satisfactory proofs of a failure or refusal to obey the order. It is likely not intended that a defendant, not in fault, should be punished; but, to avoid any mistake in that respect, we think the order should be so modified as to provide that a party shall only be so imprisoned who, having the ability to perform the order, neglects or refuses so to do. With such a modification, the judgment is **AFFIRMED.**

79	578
83	687

79	578
90	875

79	578
126	629

DIAMOND V. PALMER.

1. **Pensions: EXEMPTION OF PROPERTY PROCURED WITH.** One who pays pension money for the services of a stallion upon mares owned by him, and which were also bought by him with pension money, may hold the colts resulting from such service exempt from liability for his debts, to the extent, at least, of the money paid for such services. To that extent he has invested pension money in the colts, within the meaning of chapter 23, Laws of 1884. [ROTHROCK, J., *dissenting.*]
2. **Appeal: SUPERFLUOUS ABSTRACT: COSTS.** Although the judgment is reversed, the costs of twenty-three pages of appellant's abstract is taxed to him, because it is by so many more pages more lengthy than necessary to present the questions raised by the appeal.

Appeal from Montgomery District Court.—HON.
GEORGE CARSON, Judge.

FILED, FEBRUARY 11, 1890.

Diamond v. Palmer.

ACTION to recover the possession of one cow and three colts. After the evidence of both parties had been introduced, the court sustained a motion of defendant to instruct the jury to return a verdict in favor of plaintiff for the cow, and in favor of defendant for the colts. A verdict was returned accordingly, which fixed the value of the colts at one hundred and thirty dollars. Defendant elected to take judgment for the value of the colts as found by the jury, and a judgment for that amount was rendered in his favor. The plaintiff appeals.

F. P. Greenlee and *C. E. Richards*, for appellant.

Z. T. Fisher and *S. McPherson*, for appellee.

ROBINSON, J.—The appellee, as sheriff, levied upon the property in controversy, an execution issued in favor of D. W. Jones, and against plaintiff, for the sum of \$322.93, besides interest and costs. Appellant claims that the three colts were exempt from execution by virtue of chapter 23 of the Acts of the Twentieth General Assembly. They were foals of two mares which were purchased with money received as a pension from the general government, and the services of their sire were paid for with such money. Appellant has been a resident of the state sixteen years.

I. The portions of the statute referred to which are material to the questions involved in this appeal are as follows: "Section 1. All money received by any person, resident of the state, as a pension from the United States government, whether the same shall be in the actual possession of such pensioner, or deposited, loaned or invested by him, shall be exempt from execution or attachment or seizure by or under any legal process whatever, whether such pensioner shall be the head of a family or not. Section 2. The homestead of every such pensioner, whether the head of a family or not, purchased and paid for with any such pension

1. PENSIONS:
exemption
of property
procured
with.

Diamond v. Palmer.

money, or the proceeds or accumulations of such pension money, shall also be exempt as is now provided by the law of this state in relation to homesteads.

* * *” It is contended by appellant that not only all animals in which pension money is invested, but also all increase thereof, are exempt under the provisions of section 1. We think the claim is too broad. That section exempts only the money actually invested. Section 2 provides for the exemption of the proceeds and accumulations of pension money when invested in a homestead. The title of the statute, which is “An act to exempt from judicial sale the pension money paid to any person by the United States government, and certain proceeds and accumulations thereof,” is some indication of the legislative intent not to extend the exemption to all the proceeds and accumulations of the investments. *Smythe v. Fiske*, 23 Wall. 374. But it appears that the plaintiff had invested pension money directly in the colts in question, in paying for the services of the stallion. He has a property interest in them which was acquired by the payment of pension money. Whether or not there is also a property interest in them, not so acquired, which may be subjected to the payment of the debts of plaintiff, is a question not presented by the record, and not determined. The ruling of the district court in directing a verdict for the defendant for the colts was necessarily based, in part at least, on the assumption that plaintiff had no interest in them which was exempt from execution, and for that reason, if for no other, was erroneous.

II. Appellee complains of the abstract of appellant and has attacked it by motion. The abstract contains thirty-three pages, and is in large part merely a printed transcript of the record. Ten pages would have furnished ample space for the printing of all matter needed to present the material questions in this court, hence the cost of twenty-three pages of the abstract will be taxed to appellant.

2. APPEAL:
superfluous
abstract:
costs.

REVERSED.

ROTHROCK, C. J. (*dissenting*).—I do not concur in the conclusion reached in the foregoing opinion. If the colts in question are exempt, it must be because the defendant actually invested his pension money in them. The opinion in effect holds that to be the correct construction of the statute. The claim of the plaintiff, that the increase of all animals in which pension money is invested is exempt, is not approved by the majority; but it is held that, because the services of the stallions were paid for with the pension money, the plaintiff has an interest in the colts which is exempt to the extent of the money paid. The evidence does not show how much the plaintiff paid for the services of the stallions. But suppose that fact were shown. According to the majority opinion, the plaintiff would have an exempt interest to that extent, and the value of the colts in excess of that sum would be liable to execution. I do not believe any such result was intended by this statute; and, in my opinion, it is not a proper construction of the same to hold that there was any investment of pension money in the colts. There was an investment in the mares, but none beyond that. If it be so held, it appears to me all increase of the original purchase should be held to be exempt. Our exemption laws do not contemplate an exemption of an interest in chattel property. I do not see how, or under what authority, a partition of interests can be made between a judgment debtor and an execution creditor. It appears to me that the true construction of the statute is that such property in existence as is purchased with pension money shall be exempt. If the rule of the majority is correct, an entire crop would be exempt because the seed was purchased with pension money. In the case at bar, the value of the colts is largely the result of sustenance from the dams, of care, attention, feed and pasture, and the services of the stallions are but an inconsiderable part of their value. In my opinion the judgment ought to be affirmed.

79	582
99	507
79	582
144	348

CHAPIN AND IRISH v. THE CHICAGO, MILWAUKEE AND
ST. PAUL RAILWAY COMPANY

1. **Evidence:** PAROL TO CONTRADICT BILL OF LADING. A bill of lading is both a receipt and a contract (*Garden Grove Bank v. Railway Co.*, 67 Iowa, 526), and as a receipt it may be contradicted by parol as to the number of articles received, and especially where it states the number as so many "more or less."
2. **Instructions:** COMPREHENSIVENESS OF. It is not the office of a single instruction to embrace all the elements of defense, especially where the case is complicated, as indicated by the fact that the defendant has asked the court to give nineteen instructions on its behalf. It is sufficient if all the points in the case are fairly presented in the whole charge taken together.
3. ———: TOO FAVORABLE TO APPELLANT. Though an instruction is erroneous, it is no ground for reversal if the error is in favor of the appellant.

Appeal from Woodbury District Court.—HON. GEORGE
W. WAKEFIELD, Judge.

FILED, FEBRUARY 11, 1890.

ACTION to recover for the loss of nineteen head of cattle while in transit over defendant's line of road. Judgment was entered for plaintiffs, from which the defendant appeals.

O. J. Taylor and Marks & Mould, for appellant.

Craig L. Wright and Joy, Hudson & Joy, for appellees.

GRANGER, J.—I. The issues of the case involved a question of how many cattle were lost, the dispute being whether the number was thirteen or nineteen. Plaintiffs sought to show by

1. **EVIDENCE:**
parol to con-
tradict bill of
lading. parol how many cattle were delivered to the defendant for transportation, and, over the defendant's objection, were allowed so to do, fixing the number

Chapin & Irish v. The Chicago, M. & St. P. Ry. Co.

at one hundred and seventy-four, while the bills of lading issued by the defendant showed but one hundred and sixty-seven, "more or less." Defendant urges that parol evidence is inadmissible to contradict the bill of lading. It is a well-known rule that receipts are an exception to the general rule as to the admissibility of parol evidence to contradict or change. In *Garden Grove Bank v. Railway Co.*, 67 Iowa, 526, it is held that a bill of lading is both a receipt and a contract, and the particular in which the testimony in this case sought to contradict or vary the bill of lading was as to the number of cattle received, and the offer was within the rule recognized. Again, it is doubtful if the testimony was a contradiction, as the bill of lading only specified the numbers "more or less," which expression indicates an uncertainty as to the number. It was proper to show by parol the number of cattle actually shipped.

II. While the cattle were in transit the train was overtaken by a violent snowstorm, at Whittemore, Iowa. The train had proceeded about two
2. INSTRUCTIONS: comprehensiveness of. and a half miles west of Whittemore, where it was stopped by drifts, and then backed to the station, and the cattle unloaded by the trainmen, and put in a yard, from which the missing ones escaped, and died on the prairie. The court, in its third instruction, explained to the jury that the defendant would not be liable for any loss which resulted from an act of God. The instruction undertakes quite minutely to explain what would constitute an act of God; the liabilities of common carriers in general; and their duties in cases where an act of God is relied upon as a defense against loss of property while in their custody. The criticism against the instruction is very indefinite, so much so that we hardly know how to treat it; and, while saying this, we think it about as definite as the instruction will admit of. The instruction may, as urged, contain some unnecessary statements, and few instructions are not vulnerable to such a

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claim. While the argument says the instruction "contains much that does not apply to the case," it urges that "the rights of the defendants are not sufficiently set forth;" that "it does not contain all the elements involved in the defense, which were asked by defendant's instructions." It is true the instruction does not contain, nor is it the office of a single instruction to embrace, so much. The instructions asked by the defendant are no less than nineteen, and upon a variety of subjects, and, if proper to be given, should be expressed in separate instructions. The instruction is lengthy, and we do not set it out, but we think it a fair expression of the law designed to be covered by it, as applicable to the case.

III. The fourth instruction is made the basis of an assignment, and is as follows: "Par. 4. If you find from the evidence the shipment of the stock as alleged in the petition, and the train in which said stock was transported, by reason of a storm and extreme cold, was unable to proceed beyond Whittemore; and that the defendant, by its agent and servants, unloaded said cattle at Whittemore, without the consent of plaintiffs, and placed them in yards insufficient in strength or size to ordinarily prevent cattle from escaping therefrom, and that they escaped therefrom without any fault or negligence on the part of the plaintiffs; and that in placing said stock in such insufficient yards the defendant did not exercise reasonable care and prudence; and that any of the stock so escaping were lost and perished without any negligence on the part of the plaintiffs contributing thereto,—then you will find for the plaintiffs; but if you find from the evidence that the cattle were then in charge of one of plaintiffs, and were unloaded at Whittemore at his request, to be sheltered and fed, and he took charge of the same, and placed them in the yards, from which they escaped and perished in the storm, then the defendant would not be liable. If you should find that defendant was requested to place cars of cattle next the coal

THE SAME.

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sheds, and defendant failed to comply with the request, such failure would not, as a matter of law, be negligence. You will determine whether defendant was negligent in its care of the cattle, from all the facts and circumstances in evidence."

It must be conceded that in so far as the instruction attempts to express the law it is correct. The criticism upon it is: "It is open to much the same objections as the third one; it does not set forth all the elements of defense." The argument then proceeds upon that theory, and says: "It takes no account of any duty or obligation on the part of the plaintiffs towards the care of the cattle, unless he had in fact taken exclusive charge of them; and leaves the inference that the plaintiffs could, by refusing to consent to any act of defendant in trying to preserve the cattle, and, though present, refraining from exercising exclusive control over them when unloaded, cast the entire burden and responsibility as to their preservation on the defendant; and, in that part of it as to the claimed request as to placing cars next the coal sheds, it simply says such failure so to place them would not, as a matter of law, be negligence." Looking to other instructions given, the grounds of complaint are covered in every essential particular. The liability of the defendant is placed clearly on its negligence in placing the cattle in an insecure place, and the jury are expressly told that, if the loss did not occur in consequence of such negligence, the defendant is not liable.

It is urged that no rule is given in this instruction "as to loss by the act of God." That is true, but the rule is given in the third instruction. As illustrating the complaints generally as to the instructions, it is said this instruction gives no rule as to the burden of proof. But the following, as taken from other instructions on the burden of proof in the case, are given: "Par. 3. Such are the issues made by the parties by the pleadings herein, and you are instructed that the burden is upon the plaintiffs, in order to entitle them to recover, to

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prove to you by a preponderance of the evidence all the material allegations of their petition which have not been admitted in defendant's answer, and substantially as set forth in the first paragraph of this charge." The answer admitted the receipt of the cattle, except as to the number admitted; their transportation; and set up facts as to their being lost in the storm. In fact, to a *prima-facie* right to recover, it was only necessary for the plaintiffs to show the number of the cattle lost, and their value. With the loss established by the defendant as a common carrier, the burden shifted to it to justify the loss. *McCoy v. Railway Co.*, 44 Iowa, 424.

Then, as to the burden shifting to the defendant, the court in the same instruction, after elaborating the law as to the liability of the defendant, said as follows: "Ordinary care depends on the circumstances of each particular case, and is such care as a person of ordinary prudence and skill would usually exercise under like or similar circumstances, and the failure to exercise such care is negligence. So in this case, if you find from the evidence the shipment of the stock in question, the payment of the freight thereon, and the failure to deliver all thereof, as alleged in plaintiffs' petition, and set out in the first paragraph of this charge, then the plaintiffs will have made out a *prima-facie* case to entitle them to recover in this action, and the burden will be upon the defendant to prove that that care and skill on their part would not have prevented the loss or injury; or that the stock, if any, was lost through the intervention of the act of God, or by reason of the viciousness or unruliness or fault of the stock while being transported, or that the plaintiffs were in charge thereof in transportation, and failed to exercise reasonable care over same, which resulted in the loss of the cattle; and, if either of these have been shown, then the burden of proof is shifted to plaintiffs to show affirmatively, by their evidence, that negligence on the part of the defendant contributed to or concurred with the act of God, or

8. —: too
favorable to
appellant.

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with the disposition of the stock, and produced the injury or loss complained of." Without approving the entire instruction, we say that if there is error it is in favor of the defendant, and of which it should not complain.

IV. The defendant asked some nineteen different instructions, some of which are entirely inapplicable to the real issue being tried, and many are a restatement of those given by the court, in different language and form, the giving of which would have been no more advantageous to the defendant than those given. To set out the instructions asked, and comment upon the action of the court in refusing them, would serve no good purpose. We unite in saying that the case was fairly submitted by the instructions given. The testimony fully sustains the verdict. **AFFIRMED.**

BROOKMAN V. THE CITY OF CRESTON.

1. **Cities and Towns: POWERS: DISPOSITION OF PUBLIC PROPERTY.**

A city has no power, either under section 470 of the Code, or under section 1, chapter 89, Laws of 1880, or under any other statute, to convey its real estate to the county in which it is located, in consideration of the location of the county-seat in such city. (Compare *District Township v. Thomas*, 59 Iowa, 50.)

2. **—— : UNLAWFUL DISPOSITION OF PROPERTY: INJUNCTION BY TAXPAYER: GOOD FAITH: EXTENT OF INTEREST.** Where a city is attempting to dispose of public property without authority of law, one who has property liable to taxation in the city may maintain an action to restrain such disposition, though he be not a resident of the city (see opinion for citations); and the court cannot inquire into his motives in prosecuting the action, nor deny him relief because his interest as a taxpayer is inconsiderable.3. **—— : —— : —— : WHEN RIGHT OF ACTION MATURES.** Plaintiff in such case need not defer his action until a tax has actually been levied upon his property by reason of the wrongful disposition of the property of the city, but may have the preventive remedy by injunction as soon as damage is threatened by the unlawful act.4. **—— : —— : REMEDY.** In such case injunction to prevent the unlawful act is the proper remedy, and not *certiorari*.

79	587
102	77

79	587
104	388

79	587
106	467
106	677

79	587
116	99

79	587
128	54

79	587
134	431

Brockman v. The City of Creston.

*Appeal from an order allowing an injunction, granted
by Hon. J. W. HARVEY, Judge of the Third
Judicial District.*

FILED, FEBRUARY 11, 1890.

PLAINTIFF, in his petition, prays that the defendants may be enjoined from enforcing and obeying an ordinance of the city of Creston providing for the conveyance of certain lots, and the city buildings thereon, of the value of thirty-five thousand dollars, to Union county, and restrained from the delivery to it of a deed executed under said ordinance, and held as an escrow by one of the defendants, to be delivered when the county shall remove the county-seat from Afton, and relocate it at Creston. An order for a preliminary injunction was allowed, from which defendants appeal.

J. B. Sullivan, Thomas L. Maxwell, Hanna & Porter and McDill & Sullivan, for appellants.

J. M. Milligan and T. M. Stuart, for appellee.

BECK, J.—I. The facts of this case are few, and involve no dispute. The defendant acquired the title of certain lots in the city of Creston, and erected thereon a large and valuable building, which, together with the lots, is worth thirty-five thousand dollars. The building has been used for city purposes, but is larger than is demanded therefor, and is well adapted for a court house, and offices required by the county. It appears to have been constructed for use by the county, and was intended as an inducement for the relocation of the county-seat at Creston. The city adopted an ordinance donating, with certain reservations, the lots and building to the county on condition of the relocation of the county-seat at Creston, and executed a deed to the county conveying, with reservations specified in the ordinance, the property to it, which was put into the possession of one of the defendants to be held as an escrow, and to be delivered to the

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county upon the performance of the condition of the relocation of the county-seat at Creston. A petition is being circulated by a large number of the citizens of the county, with the expectation and purpose of procuring signers in sufficient numbers to authorize the submission of the question of relocation to a vote of the people. The plaintiff is a resident of Afton, and has never lived in Creston, though he owns real estate of small value there. He is opposed to the relocation of the county-seat at Creston, and has circulated and signed remonstrances against it.

II. It is a familiar rule of the law that cities and other municipal corporations can exercise only such authority as is expressly granted by their charters, or legislative acts creating them, or necessarily implied in such grant, or incident thereto; and reasonable doubts as to the existence of authority in such corporations are always to be resolved against it. See 1 Dill. Mun. Corp., sec. 55, and cases cited. No statute of this state grants cities the authority to dispose of or convey their property except for purposes contemplated by law. They have power to dispose of their real property for purposes authorized by law, and for no other purpose. The purpose of the disposition of the lands determines the question of authority. A city may sell its lands when its interests require that they be sold; but it possesses no authority to give away, or to convey, without consideration, or for a purpose which it has no authority to advance, any of its property. The city holds its property for the uses and benefits of the people. It is, as it were, a trustee for its citizens, and must use the property it holds for purposes sanctioned by law. There is no statute authorizing a city to erect buildings for the county, or to give to it a house and lands, to induce the relocation of the county-seat. It may probably be to the advantage of the city and its citizens to induce such an act. It may probably result to the great advantage of the citizens that manufactories, storehouses, hotels and the like be constructed. But it is

1. CITIES and towns: powers: disposition of public property.

Brockman v. The City of Creston.

not within the authority of the city to convey its property for such purposes. Counsel for defendant thinks that the authority to dispose of the lands of the city to secure the county-seat is conferred on the city government by Code, section 470, and section 1, chapter 89, Acts Eighteenth General Assembly. The first statute is as follows: "They shall have power to purchase or condemn, and pay for out of the general fund, and enter upon and take any lands within or without the territorial limits of such city or town for the use of public squares, streets, parks, commons, cemeteries, hospital grounds, or any other proper and legitimate municipal use, and to enclose, ornament and improve the same. They shall have entire control of the same, and shall have power, in case such lands are deemed unsuitable or insufficient for the purpose for which they were originally granted, to dispose of and convey the same; and conveyances executed in accordance with this chapter shall be held to extinguish all rights and claims of any such town or city to such lands existing prior to such conveyance. But, when such lands are so disposed of and conveyed, enough thereof shall be reserved for streets to accommodate adjoining property-owners." For the other statute, see McClain's Code, section 730, and Miller's Code, 141. It is in this language: "Any city of the first or second class, organized under the general laws of this state, shall have power to acquire real estate, or an interest therein, as a purchaser at an execution sale, where such city is the plaintiff in execution, or otherwise interested in the proceeding, and to dispose of the property, or interest therein, so acquired, and also to dispose of any real estate, or interest therein, including any streets or portion thereof vacated or discontinued, however acquired or held by such city, in such manner and upon such terms as the city council shall deem just and proper." These statutes confer no authority upon the cities to convey lands or other property for uses not contemplated by law. The statutes authorize the cities to dispose of the lands. It may be admitted that the purposes of the disposition

are not prescribed by the statute. It surely does not prescribe that such disposition shall be made to enable the city to do things for which no authority is conferred. The exercise of such power is not incidental to the exercise of power conferred upon the city, or necessary for the exercise of any express power. Should there be doubt upon this subject,—and surely it cannot be claimed that these statutes should be interpreted to confer the power in question without a doubt,—that doubt must be resolved against the existence of the power in, and its exercise by, the city. In obedience to the doctrines we have just announced, we must hold that the conveyance of the property in question cannot be made in the exercise of the lawful authority of the city. See, in support of these conclusions, *District Township v. Thomas*, 59 Iowa, 50.

III. It is insisted by defendants' counsel that plaintiff cannot maintain this action for the reason that he is not a citizen, resident or taxable inhabitant of the city. The position of counsel is to the effect that a non-resident owner of property in a city can have no remedy against it to restrain the illegal sale or disposition of property. It is not denied that a citizen, resident or taxable inhabitant of the city could maintain this action. We think that a resident owner of property situated in a city is entitled to no measure of justice which is denied to a non-resident owner. He is entitled to his action to restrain the unlawful disposition of city property, for the reason that his interests as a taxpayer are prejudiced thereby. Now, surely it cannot be pretended that a non-resident taxpayer is not entitled to maintain an action to restrain acts of the city government which are prejudicial to his interest, when a resident could maintain such proceedings. It will be at once seen that such a distinction as to the rights of property-owners is in conflict with just ideas of that equality of rights which is secured by the foundation principles of our laws, and by constitutional guaranties. 2 Dill. Mun. Corp., sec. 736; High. Inj., sec. 794. In the

2. —: unlawful disposition of property: in-junction by taxpayer: good faith: extent of interest.

Brockman v. The City of Creston.

following cases the residence or citizenship of persons whose interests were prejudiced by municipal action was not esteemed essential to authorize them to maintain actions: *Brandirff v. Harrison County*, 50 Iowa, 164; *Olmstead v. Board*, 24 Iowa, 33; *Litchfield v. Polk County*, 18 Iowa, 70. It must be remembered that the doctrine we recognize is not based upon the right of the property-owner or taxpayer, resident or non-resident, to dictate and control the administration of the city government, and to nullify by proceedings in the courts the lawful acts of the city officers, legislative or executive, done in the administration of the city's affairs, for the reason that the proposed acts of the city do not promote its interest, or are against public policy. The foundation of the doctrine is the interference with the rights of the taxpayer in the increase of the burden of taxation, or the liability thereto, by misappropriating the property of the city, which may demand the levy of taxes to acquire other property in its place; or, the property having been acquired through taxation, its disposition would be in effect a misappropriation of taxes which may occasion levies to take the place of the misapplied tax.

IV. It is urged that the plaintiff is not prosecuting this action in good faith. This claim is based upon the ground that he is a resident and property-owner of Afton, the county-seat, which the people of Creston are endeavoring to relocate. It is argued that he is impelled by motives of self-interest which will be promoted by the defeat of the effort of the Creston people to cause the removal of the county-seat to their town. As we have seen, his right to prosecute this suit is based upon the fact that he is a taxpayer of Creston. We cannot inquire into his motives, but must enforce the rights which he establishes, though his motives for the prosecution of the suit may be other than escape from liability from the payment of taxes.

V. It is said that the value of the plaintiff's property in Creston is inconsiderable, and his taxes, therefore, are trifling. But the law does not bestow remedies and

Lamm v. Sooy.

measure of relief because of large amounts in litigation. The taxpayer who owns property of small value is entitled to the same remedies and the same relief, to protect his rights, as the man who pays taxes on the largest property in the town.

VI. It is claimed that plaintiff is prematurely prosecuting this action, and that he cannot maintain the proceeding until a tax is levied, by reason of the disposition of the house and lot in question. But the law will grant preventive remedies when loss and damage are threatened by the act of the city government. Not only will plaintiff's rights be more perfectly protected by enjoining proceedings before taxes be levied, but the interests of the city and citizens will be secured from the unjust effects which might flow from declaring the city's action illegal after contracts and deeds were executed in reliance thereon.

VII. Counsel claim that the plaintiff has erroneously chosen his remedy; that it should have been by *certiorari*. But it is well settled that the proper proceeding to arrest an attempt of a municipal corporation to unlawfully dispose of its property to the injury of the taxpayers, as well as to do other acts void for want of authority, is in chancery, where an injunction will afford the appropriate relief.

These considerations lead us to the conclusion that the order of the district court allowing the injunction ought to be

AFFIRMED.

Lamm v. Sooy (two cases).

1. **Estates of Decedents : CLAIMS : LIMITATION : EQUITABLE RELIEF : MODE OF TRIAL.** Where a claimant of the fourth class seeks to prove his claim against the estate of a decedent more than twelve months after notice of administration, the court should first determine whether the circumstances are such as, in equity, should remove the bar of the statute (Code, sec. 2421), and, if so, the

Lamm v. Sooy.

issues of fact arising by operation of law should be submitted to a jury, unless a jury is waived. (See *Ingham v. Dudley*, 60 Iowa, 22.)

2. ———: BELATED CLAIMS : EQUITABLE RELIEF. The decedent in this case was surety on one note, and the guarantor of others, and all the notes belonged to plaintiff, and he filed his claims based thereon against the administrator after six, but within twelve, months of the publication of the notice of administration. He did not file his petition for proving up the claims until after the twelve months had expired, and, to take the case out of the special statute of limitations (Code, sec. 2421), he showed that the delay was caused by an effort on his part to make the claims out of the principal debtors, against whom he had proceeded with all possible dispatch, but with only partial success, and that he filed his petition to prove up the claims as soon as he knew that they had not been allowed. The estate was unsettled, and it did not appear that it was prejudiced by the delay in prosecuting the claims. *Held* that the court rightly adjudged plaintiff to be entitled to equitable relief as against the bar of the statute.

Appeal from Shelby District Court.—HON. GEORGE CARSON, Judge.

FILED, FEBRUARY 11, 1890.

ACTIONS to establish certain claims against the estate of Michael Langton, deceased, of which the defendant Sooy was the duly appointed and qualified administrator. There being two cases, resting partly upon the same facts, and involving the same questions, they are submitted together. On June 27, 1887, plaintiff filed his petition to establish his claim on a note alleged to have been executed to him by C. A. Topping and the deceased for one hundred and fifty dollars, with ten per cent. interest from date; that he had filed said claim July 17, 1885; that said administrator neglected to allow the same. Wherefore he asks that it be established and allowed. On March 13, 1888, he filed an amendment, stating that deceased was surety on said note; that he had filed the same for allowance within twelve months from the qualification of defendant as administrator; that he had filed his petition at the first term of court after the note became due, seeking to collect the same from Topping; that Topping filed an answer for

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delay only, and that plaintiff was prevented from obtaining judgment until May 19, 1885; that, with due diligence, he caused an execution to issue against said Topping, which was returned, December 5, 1887, wholly unsatisfied, whereupon plaintiff filed his petition to have his claim allowed, and as soon as he knew of said claim having been disallowed; "that the estate has not suffered any damage because of the claim not having been sooner established; that the estate is not closed; and the plaintiff claims that he is now, under the equity branch of the court, enabled to prove his claim against said estate."

On March 13, 1888, appellee filed his motion to transfer the case to the equity calendar, and that the same be tried as an equitable cause, which motion was sustained, to which appellant excepted. On the fifteenth day of June, 1888, cause came on for hearing, and appellant, in open court, demanded the impaneling of a jury to try the issues in the case, which request was overruled by the court, to which appellant excepted. Thereupon the court proceeded to hear the cause, and, being fully advised, ordered and decreed that the claim be allowed, with interest, to which the appellant also excepted.

On the same (twenty-seventh) day of June, 1887, the plaintiff also filed his petition for an allowance of \$839.06, balance alleged to be due "on judgment in the district court, Shelby county, Iowa, on notes and mortgages guarantied by decedent, copies of which are hereto attached," which claim was indorsed: "Filed July 6, 1885. W. J. DAVIS, Clerk. Rejected. H. B. SWIFT, Administrator." Each of the six notes set out was indorsed.

"For value received I hereby guaranty payment of the within, with interest at eight per cent. per annum, waiving demand and notice of protest.

"M. LANGTON."

On March 13, 1888, appellee filed an amendment, stating that the notes were given to him by John A.

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Wright, and secured by mortgage on the lands described; that deceased indorsed and guarantied said notes to plaintiff for valuable consideration; that the last of said notes becomes due August 15, 1890, each one of said notes falling due one year apart from their date. Appellee avers that he caused the debt to become due, under the terms of the mortgage, on the fifteenth day of January, 1885, and procured his decree of foreclosure January 14, 1885, and caused special execution to be issued for the sale of the property, which was sold May 16, 1886, for one thousand dollars; and that the balance of the judgment could not be made of Wright, as he was insolvent. Appellee states that he could not have filed, or had his claim established, for the reason that he did not know until August, 1887, that his claim had been disallowed by the administrator, and at once filed his petition to have his claim allowed;" that the estate is still open, and no injury can come to it by reason of this claim not having been established within twelve months of the appointment of the administrator; and asks that the same be now established. On March 13, 1888, the plaintiff filed a motion to transfer to equity, the same as in the other case, which was sustained, and appellant excepted. On June 15, 1888, the cause came on for hearing, and like proceedings were had to those in the other case, and an order and decree that the claim be allowed. From these orders and decrees the defendant appeals.

Smith & Cullison, for appellant.

Platt Wicks and *Beard & Myerly*, for appellee.

GIVEN, J.—I. These claims, not having been filed within six months after the first publication of notice of the administrator's appointment, became claims of the fourth class. Code, sec. 2420. Claims of that class, "not filed and proved within twelve months of the giving of the notice aforesaid, are forever barred, unless the claim is pending in the district or supreme court, unless

1. ESTATES of
decedents:
claims: limi-
tation: equit-
able relief:
mode of trial.

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peculiar circumstances entitle the claimant to equitable relief." Code, sec. 2421. We understand appellee's position to be that claims presented for allowance after twelve months, because of peculiar circumstances entitling the claimant to equitable relief, are of equitable cognizance. Clearly, it is for a court of equity to determine whether the peculiar circumstances alleged and proven entitle the claimant to equitable relief; that is, whether the circumstances are such as that, in equity, the bar of the statute should be removed.

Section 2411, Code, provides that, if the claim is not admitted, the court may hear and allow the same, or may submit it to a jury; and on such hearing, unless otherwise provided, all provisions of the law applicable to an ordinary proceeding shall apply. Issues of fact, in an action in an ordinary proceeding, must be tried by a jury, unless the same is waived by the parties. Code, sec. 2740. It is provided in section 2410 that "all claims filed and not expressly admitted in writing, signed by the executor, with the approbation of the court, shall be considered as denied, without any pleading on behalf of the estate." The defendant not having filed any answer to either petition, it follows from this provision that each and every allegation of both of the plaintiff's petitions was denied, and thereby the burden was cast upon him to prove each material allegation. Appellee's contention is that there was no issue submitted to the trial court except as to whether the claims were barred or not. Surely, other issues were joined, whether considered or not. The only facts admitted on the trial were that Sooy had been administrator since the seventh of August, 1884; that the note introduced in evidence in the first case is the original one filed in this case against M. Langton, deceased, and the same upon which judgment was rendered against Topping. There was no admission that the deceased had executed the note with Topping, or that he had executed the guaranties on the other six notes, or that the same were unpaid. In short, none other of the allegations of the

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petition were admitted. It is said that the administrator admitted in his report that the deceased sustained the relations alleged to these notes. That, at most, was but evidence; but we do not think his report will bear such construction. In reporting claims filed against the estate, he states: "X. Lamm, on guaranty note, \$839.06. X. Lamm, on security note, \$179.52. Administrator has not sufficient information to pass upon, as yet." This is no admission, but a statement of the alleged character of the claims filed.

Standing thus, the first issue to be determined was whether the circumstances proven were such as, in equity, should remove the bar of the statute, and, if so, then whether the claimant was entitled to an allowance of the claims, or any part thereof. The latter are clearly issues of fact; tried by ordinary proceeding, and hence "must be tried by jury, unless the same is waived." The provisions of section 2421, Code, were not intended to deprive the parties of a trial by jury when otherwise they would be entitled thereto. Our conclusion is that in such cases the court should hear and determine whether the circumstances are such as to entitle the claimant to equitable relief as against the bar of the statute; and, if so, then that the case be disposed of the same as other claims. See *Ingham v. Dudley*, 60 Iowa, 22.

II. The issues as to the plaintiff's right to equitable relief against the bar of the statute were fully heard, and fairly disposed of. The circumstances alleged and established as grounds for equitable relief in the first case are that the deceased was surety on the note. The plaintiff proceeded, with all possible dispatch, to make collections, as far as he could, from the principal; and, that failing, he filed his petition herein as soon as he knew that the claims had been disallowed. In the other case, it is sought to charge the estate because of the deceased having guarantied the six notes, the last of which is not due, according to its face. Appellee states that, under a provision of the mortgage, he declared the whole debt

2. —: belated
claims; equit-
able relief.

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due, and proceeded to the collection thereof against the maker of the notes, realizing, by foreclosure and sale, one thousand dollars in May, 1885, and that he did not prove his claim against the estate for the balance, for the reason that he did not know until August, 1887, that it had been disallowed. Mr. Wicks testifies that Mr. Sooy was demanding that the money should be made from Topping before the estate should be compelled to pay. This is denied by Mr. Sooy, but it was certainly very natural, under the circumstances, that he should desire that the collections should be made from the principal, as far as possible; and such seems to have been the effort and purpose of the plaintiff. In *Johnston v. Johnston*, 36 Iowa, 608, it was said: "Each case must be determined upon its own peculiar circumstances. * * * 'A most controlling consideration is that the estate remains unsettled. The assets have not been distributed, and had not when this claim was filed. That equality which is equity dictates, as a rule, that the assets of an estate should be paid to creditors in proportion to their demands, and when the estate remains unsettled all should be paid, if there are sufficient means, and, if not, then *pro rata*, unless there exists some legal difficulty, or unless to so order would work injustice to others having higher or equal claims upon the funds.' " In view of the nature of the claims and all the circumstances, we are of the opinion that the claimant is, in equity, entitled to be relieved against the bar of the statute, and that, in so far as the judgment of the district court so finds, it should be affirmed. Our opinion is that the appellant was entitled to a trial by jury upon the issue joined by operation of law, as to the validity of claims, and that the court erred in denying that right. The order and judgment of the district court is, therefore, affirmed as to the finding that the claims are not barred by the statute, and is reversed in so far as it finds that said claims should be allowed against the estate. The case will be remanded for further proceedings in accordance with this opinion.

REVERSED IN PART; AFFIRMED IN PART.

PHILLIPS V. CARPENTER *et al.*

Life Insurance: PAYABLE TO "LEGAL HEIRS:" WIDOW NOT AN HEIR. Where a decedent left a widow and one child, and also a life insurance policy payable to his "legal heirs," *held* that the widow was not included in the term "legal heirs," and that the whole amount of the policy was payable to the guardian of the child. (See opinion for meaning of word "heirs" in this state.)

Appeal from Jones District Court.—HON. J. H. PRESTON, Judge.

FILED, FEBRUARY 11, 1890.

ACTION to recover one-half of the amount paid upon a policy of insurance. Dr. J. H. Phillips died, leaving the plaintiff, his widow, and one child, Bessie Phillips, a minor, surviving him, of which minor H. M. Carpenter was duly qualified as guardian. The deceased, at his death, held a certificate of insurance on his life, in full force, issued to him by the Grand Lodge of the Ancient Order of United Workmen of the State of Iowa, for two thousand dollars, payable, at his death, to "his legal heirs." By agreement, the grand lodge paid one thousand dollars to H. M. Carpenter, guardian, and one thousand dollars to R. M. Bush, clerk of said court, which last one thousand dollars is held subject to the result of this suit. Issue being joined, as to whether the said Irene B. Phillips, widow, is a legal heir of said deceased, the cause was submitted to the court, and judgment entered for the one thousand dollars in the hands of R. M. Bush, clerk, in favor of H. M. Carpenter, guardian. Plaintiff appeals.

Remley & Ercanbrack, for appellant.

J. W. Doxsee, for appellees.

GIVEN, J.—I. The certificate under consideration being payable to the “legal heirs” of Dr. J. H. Phillips, deceased, the proceeds thereof are not to be divided as personal property of the estate, but go directly to the persons designated in the certificate. The sole question presented in the record is whether the plaintiff, widow of the deceased, is a “legal heir,” within the meaning of those words as used in the certificate. It is conceded that at common law the widow was not an heir of her husband, because her dower right began at the time of her marriage, and became complete on the death of her husband, and could not be taken away, by will or otherwise, without her consent. Mr. Blackstone (2 Comm. 201) defines an “heir” to be “he upon whom the law casts the estate immediately on the death of the ancestor.” Adopting this definition, appellant contends that our statutes with respect to the widow’s right to share in life insurance, in personal property, and in real estate in excess of one-third, makes her a legal heir. Sections 1182 and 2372 exempt the proceeds of life insurance from the payment of debts, and provide that it shall inure to the separate use of the husband, or wife and children, to be disposed of like other property left by the deceased. As between the assured and the insurer, the policy is a contract for the benefit of the beneficiary, who takes by contract, rather than by inheritance. The naming of the beneficiary, though not a bequest, partakes of its nature. *Robinson v. Duvall*, 12 Rep. (Ky.) 466. The widow is not made a legal heir of her husband by the statutes. She takes under the contract, of which the statutes are a part, and not by inheritance. As to personal property, while it is true the husband may dispose of it during his life without the consent of his wife, he cannot dispose of it by will so as to deprive his widow of her rights therein. She takes of the personal property as a matter of right, and not as an heir.

The only instance, under our statutes, wherein the rights given to a widow partake of the nature of heirship, is under section 2455, Code, which provides: “If

the intestate leave no issue, the one-half of his estate shall go to his parents, and the other half to his wife." In *Burns v. Keas*, 21 Iowa, 257, it was held, as to all in excess of one-third, the widow takes as heir at law. See, also, *Smith v. Zuckmeyer*, 53 Iowa, 14. As to the excess over one-third, the widow takes, not by contract, nor in her own right, but as an heir. It will be observed that the plaintiff is not entitled to share in the proceeds of this insurance, under sections 1182 and 2372, unless she is a legal heir; for such are designated as the beneficiaries. *Blackman v. Wadsworth*, 65 Iowa, 80, is directly in point. There was a devise by George Briggs to H. H. Blackman, who died before the testator, leaving the plaintiff, his widow, and a brother, Charles, surviving him. The question was whether the plaintiff was heir to her deceased husband, so as to inherit the devise under section 2337, which provides: "If a devisee die before the testator, his heirs shall inherit the amount so devised to him." The court says: "Where a word like the word 'heirs' has a plain and well-recognized meaning, we ought certainly, as a general rule, to adopt that meaning; and we should not be justified in adopting any other, except for reasons of a very cogent character. We do not discover such reasons in the case at bar, and conclude that Charles M. Blackman is the heir of his deceased brother, Henry H. Blackman, within the meaning of the statute in question. While we hold that the brother is heir, we are disposed to hold that the widow is not." There are certainly no more cogent reasons in this case than in that for holding that the widow is the legal heir.

As designating a beneficiary in a policy of insurance is in the nature of a testamentary devise, we are to determine whom the deceased intended by the designation "legal heirs," and in doing so we are to consider the circumstances under which the designation was made, and the technical and generally accepted meaning of the words employed. It does not appear whether the

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assured had a right to change the beneficiary or not, nor are any other circumstances shown, except that he left the plaintiff, his widow, and one child surviving him. These circumstances not only show that the plaintiff is not entitled to recover under section 2455, Code, the intestate leaving issue surviving, but indicate an intention that she should not share in the proceeds of this insurance. If the term "legal heirs" was used in its technical sense, then she is not such because of the issue surviving; if in the commonly accepted sense, then she is not a legal heir. The distinction between the word "widow" and the word "heir" is marked in common parlance. No one having children speaks of his wife, in contemplation of her survivorship, as his heir; but it is believed it is universal that she is referred to as widow, and the children as heirs. While technically, and in the single instance stated, a widow may become a legal heir of her deceased husband, our conclusion is, under the facts of the case, that whether used in their technical or general sense, the words "legal heirs" were not intended, and should not be construed, to include the plaintiff.

II. Appellee filed a counter-claim containing certain allegations which, on motion of plaintiff, were struck out as immaterial. The judgment being for appellee, and he not having appealed, we cannot consider his complaint against the sustaining of said motion. The judgment of the district court is

AFFIRMED.

COBB V. McELROY.

Contracts: UNDERSTANDING OF PARTIES: CONSTRUCTION. Section 3652 of the Code, which provides that "when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it," applies to oral as well as to written contracts.

79	603
110	543
79	603
117	198
79	603
183	78

Cobb v. McElroy.

Appeal from Louisa District Court.—HON. J. K. JOHNSON, Judge.

FILED, FEBRUARY 12, 1890.

ACTION to recover an amount alleged to be due by virtue of a verbal agreement and on account. There was a trial by jury, and a verdict and judgment for defendant. The plaintiff appeals.

R. Caldwell and *L. A. Riley*, for appellant.

No appearance for appellee.

ROBINSON, J.—The amount involved in this case being less than one hundred dollars, the trial judge certified to this court certain questions of law for its determination.

I. The first question we are required to consider is stated as follows: "Where action has been brought upon a parol contract, which contract is denied in the answer of defendant, is section 3652 of the Code applicable thereto?" The section named is as follows: "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it." We think the question is open to objection, but, assuming that it is designed to refer only to cases where the terms of a verbal agreement have been intended in a different sense by the parties to it, it must be answered in the affirmative. Section 3652 does not distinguish between verbal and written agreements, but in letter is as applicable to one class as to the other. The terms of a verbal agreement may be disputed, and difficult to establish, but they are as much within the spirit of the statute as though written. The fact that they are denied would not affect the application of the statute. There is no ground for concluding that the general assembly designed it to apply only to agreements in writing.

The State v. Borie.

II. Other questions certified are not discussed by counsel, and need not be specially mentioned. Something is said in argument in regard to the correctness of an instruction given, as applied to two contracts alleged to have been pleaded, but that is a matter not presented by the questions certified, and for that reason it cannot be considered. The judgment of the district court is

AFFIRMED.

THE STATE V. BORIE.

Bastardy: PATERNITY OF CHILD: EVIDENCE. In a bastardy proceeding, where it was shown that the prosecutrix was much in the company of a man other than the defendant shortly before the child was begotten, and that she had had a marriage engagement with such other person, which had for some time been abandoned, evidence that she and such other person had, some eight years before, been together at a hotel, locked up in a room for several hours, was properly admissible as bearing upon the probable character of their associations near the time when the child was begotten, and thus upon the question of the paternity of the child.

79	605
80	592
79	605
87	356
79	605
89	191
79	605
108	742
79	605
122	86

Appeal from Buchanan District Court.—HON. D. J. LENEHAN, Judge.

FILED, FEBRUARY 12, 1890.

PROCEEDING under the bastardy act. From judgment for maintenance, the defendant appeals.

Chas. E. Ransier, for appellant.

H. W. Holman, for appellee.

GRANGER, J.—Mary Weismiller is the mother of an illegitimate child, born April 25, 1888; and she institutes this proceeding against the defendant, as its putative father, for its support. The record presents but one question which we are required to notice. The alleged intercourse, under the statements of the prosecuting witness, occurred somewhere from the tenth to

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the twentieth of August, 1887. In July before, the prosecuting witness was in the company of one Damon, with whom years before she had a marriage engagement, which had been abandoned or broken for some time. She rode with him from Independence to Oelwein, July 4, some twenty miles, and the last of July she was twice in his company when she was at Oelwein, on business, at each time staying at his home over night, sleeping with his mother. The last of July she went to his house on Saturday, and on Sunday he procured a horse and buggy, and they rode together to the house of one Searls. In her testimony she stated that she was at Maynard with Damon some seven or eight years before, on a fourth of July. She was then asked if at that time she and Damon were not at a hotel, locked in a room for several hours. An objection that the testimony was incompetent, immaterial and too remote was sustained, and appellant urges the ruling as error. If the intimacies had not to some extent been renewed between the prosecuting witness and Damon so recently, and at the particular time they appear to have been, we might feel induced to say the circumstances sought to be proved were too remote. If it had been true that the occurrence claimed, as to being locked in a room in a public house, had occurred in July, 1888, there would be no question of its materiality in a case where the testimony was conflicting as to the paternity of a child. In such a case, the fact would be proper for the jury to consider. It is in evidence as to her being with Damon in July, both at his home and riding with him. Now, suppose the jury should believe that the being in such a room years before was for improper purposes,—and it is a fact, unexplained, from which such an inference might be drawn, though not necessarily,—would not the fact of prior misconduct be a material aid in determining the probabilities of misconduct in July, 1888? The July visits and conduct in 1888 were allowed in proof only to let the jury say if another than defendant was likely the father of the child. It does seem as if

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the jury could better weigh such circumstances in the light of the former conduct of the parties. If, in their former acquaintance, their conduct was exemplary, and above suspicion, it might justify a like inference at the renewal of acquaintance. If otherwise, would not the fact as well aid to a just conclusion? It must not be understood that we intimate a conclusion that should be drawn from any fact which the testimony, when admitted, might establish. We only say the testimony should have been admitted and considered.

Other errors are assigned, all of which have been considered, but there is no other on which we would reverse. However, to avoid misapprehension, we will say that on some of the points the ruling would be sustained because of the condition of the record, and beyond the question of the record we have not inquired. Because of the error pointed out, the judgment is

REVERSED.

LINDSEY V. THE LE MARS BANK *et al.*

Evidence: ACTION ON LOST DRAFT. In an action for the value of a lost draft, the evidence (see opinion) is considered, and *held* to establish, without conflict, that the draft was drawn and delivered to plaintiff, and by him sent by mail to another, who never received it; that it was lost in the mail, and was never paid to any one, though seven years had elapsed; and, upon this uncontradicted evidence, *held* that plaintiff was entitled to judgment.

Appeal from Plymouth District Court.—HON. SCOTT M. LADD, Judge.

FILED, FEBRUARY 12, 1890.

ACTION for the value of a lost draft. Judgment for defendant, and plaintiff appeals.

Sam. Hussey and Martin, Gaynor & Scott, for appellant.

Argo & McDuffie, for appellee.

GRANGER, J.—The defendant Dent is a banker at Le Mars, Iowa; and on December 25, 1882, he issued to plaintiff the following draft:

“WM. H. DENT, Banker,

“LE MARS, December 25, A. D. 1882.

“Pay to the order of Edmund Lindsey one hundred and seven and fifty-one-hundredths dollars. National Bank of Illinois. WM. H. DENT.”

This draft was indorsed as follows:

“Pay to the order of A. R. Loomis.

“EDMUND LINDSEY.”

The essential averments of the petition are that plaintiff received the draft at Boonesborough, Iowa, December 26, 1882, and, with the above indorsement thereon, mailed the same at Boonesborough to A. R. Loomis, in care of Millard F. Le Roy, the private secretary, attorney, agent and cashier of said A. R. Loomis' bank at Manchester, Iowa, the said A. R. Loomis being at the time in California; that neither Le Roy nor Loomis ever received the draft, and that the draft is lost. The answer to the petition is a denial.

The only question in the case is, are the averments of the petition so established by the evidence as to entitle the plaintiff to judgment? The district court must have found they were not, as it gave judgment for the defendant.

The cause was tried to the court without the aid of a jury, and its findings have the force and effect of a verdict. The question, then, with us, is, is the testimony so without conflict that, as a matter of law, the plaintiff should have judgment? We think it is. The petition seeks to recover on the grounds that the plaintiff purchased the draft of the defendant; that it was lost in the mails, and has not been paid. The petition was not assailed by motion or demurrer, and its sufficiency cannot now be questioned. It must be regarded as stating a cause of action. We then look to the proofs.

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The plaintiff gave the following testimony: "*Answer.* The draft was dated about the twenty-fifth day of December, 1882, drawn by the Le Mars bank, Wm. H. Dent, banker, on the National Bank of Illinois, for the amount of \$107.51, payable to the order of Edmund Lindsey. My book shows that I received the draft on the twenty-fifth day of December, 1882. *Question.* What did you do with the draft? *A.* The following day, as shown by my letter-book, I indorsed the draft payable to the order of A. R. Loomis, and mailed to him in care of M. F. Le Roy, Manchester, Delaware county, Iowa, with a letter instructing Mr. Loomis to apply the amount on my notes due from me to A. R. Loomis; Loomis being at that time in California, and M. F. Le Roy being his agent, attorney and cashier of his bank at Manchester, Delaware county, Iowa." This testimony stands uncontradicted and unimpaired by other testimony in the case. It is shown on cross-examination that about that time he was doing considerable business, and buying many drafts; but his statements are made from his letter-book, showing the transmission of the draft, and in addition he says he has positive recollection that he received the draft, and sent it to Mr. Loomis. The fact that the draft was issued at that time is not disputed. With this testimony, the fact of sending the draft must be treated as established.

Next, was the draft lost? Mr. Loomis was at the time in California, and Mr. Le Roy was his cashier, clerk and agent, and had charge of his affairs in his bank. The draft was sent to Loomis, in Le Roy's care, at Manchester. He is the man who would have received it, if it reached there in the regular course of mails, which should have been, at the outside, in two days after mailing. He says in his testimony: "I have examined carefully, several times, my books, papers and office desk, and find no evidence of such draft. If mailed to me, it did not reach me; and I am positive I never had it. I never turned it over to Mr. Loomis nor

Deering v. Lawrence.

indorsed it, and never drew the money on it." Besides this, the testimony shows that he has examined the books and they furnish no evidence of its receipt.

Now, if we stop there, what is the *status* of the case? Do not these facts show a loss, if uncontradicted? Seven years have elapsed, and no trace of the draft is since found. To our minds, the testimony thus stated is amply sufficient, if uncontradicted, to show, as a matter of law, the loss of the draft.

Now let us look for testimony to present a conflict as to these facts. It is said in argument that neither Le Roy nor Loomis say they did not receive the drafts. But that is a mistake, as to Le Roy, who was the only one at home, and who would have received it. He says, in words: "I am positive I never had it." Mr. Dent says he had money in Chicago to pay the draft; but he does not say it was paid, nor is there any showing that the draft has ever been returned, as is usual. The testimony shows that such drafts are generally returned in about thirty days.

The testimony, without any conflict whatever, shows that neither Lindsey nor Loomis has ever had pay on the draft. The court cannot presume, in the absence of all evidence, that some one may have wrongfully presented it, and received payment; and such a presumption must be indulged to overcome the showing made by the plaintiff. We think, with the uncontradicted testimony in the case, there should have been a judgment for the plaintiff. REVERSED.

DEERING V. LAWRENCE *et al.*

Fraudulent Conveyance: HUSBAND AND WIFE: EVIDENCE. Defendant held the title to a farm which had been paid for in part with his wife's money, and which they contracted to sell on certain terms, but the sale was not to be consummated until a subsequent date. Prior to that date they made and recorded a deed to the purchaser without his knowledge; but he accepted the conveyance and paid for the land. With a portion of the purchase money the

Deering v. Lawrence.

wife bought other land, taking title to herself. A few days prior to the making of the voluntary deed, defendant was sued by plaintiff, and judgment was afterwards obtained against him. The wife did not know that he was indebted, and knew nothing of plaintiff's claim until after the first farm had been sold and paid for; and she contracted for the second one, and made a payment thereon, some months before the action was brought against defendant. *Held* that, though there is some evidence of a fraudulent intent upon defendant's part in making the voluntary deed, there is nothing to show that the wife participated therein; and, having purchased the second farm with her share of the proceeds of the first one, she was properly adjudged to hold it free from liability for the plaintiff's judgment.

Appeal from Lyon District Court.—HON. GEORGE W. WAKEFIELD, Judge.

FILED, FEBRUARY 12, 1890.

ACTION in equity to subject real estate to the payment of a judgment. There was a trial on the merits, and a judgment in favor of defendants. The plaintiff appeals.

E. T. Greenleaf, for appellant.

E. C. Roach, for appellees.

ROBINSON, J.—On the third day of January, 1887, plaintiff obtained a judgment in justice's court against defendant J. H. Lawrence, for the sum of \$132.07 and costs. A transcript thereof was filed on the same day in the office of the clerk of the district court of Lyon county. An execution was issued thereon by the clerk of the district court, and returned unsatisfied. On the seventeenth day of February, 1887, a deed was executed to defendant Hannah L. Lawrence, conveying an eighty-acre tract of land. Appellant seeks to have that land subjected to the payment of his judgment.

I. Appellant claims that the land in controversy was purchased with money which belonged to defendant J. H. Lawrence, and that the title thereto was taken in

Deering v. Lawrence.

the name of his wife and co-defendant, Hannah L. Lawrence, for the purpose of hindering, delaying and defrauding his creditors, and that his wife participated in the fraud.

The material facts appear to be as follows: In the spring of 1883, defendants purchased a farm in Lyon county, for which they paid the sum of twenty-four hundred dollars, of which one thousand dollars was paid by the wife with money which belonged to her. The title was taken in the name of the husband. On the eighth day of September, 1886, the husband entered into an agreement with one V. T. Reynolds for the sale of the farm for the sum of four thousand dollars, stipulating that two hundred dollars thereof should be paid on the first day of the next month, eighteen hundred dollars on the first day of March, 1887, and the remainder by the assuming and paying by Reynolds of a mortgage on the farm of two thousand dollars. A deed was to be made on the payment of the eighteen hundred dollars, March 1, 1887, and Reynolds was to pay the interest on the mortgage debt from that date. On the twenty-second of December, 1886, plaintiff commenced the action in which the judgment in controversy was rendered on a note given by J. H. Lawrence on the first day of July, 1884. Service of the original notice was acknowledged by Lawrence on the day the action was commenced. On the twenty-fourth day of December, 1886, defendants executed a deed for their farm to V. T. Reynolds, without his knowledge, and caused it to be recorded. It was afterwards accepted by the grantee, and full payment for the farm was made by him on the fourteenth day of February, 1887. A portion of the money so paid was used by Hannah L. Lawrence in paying for the land in controversy.

There is some ground for believing that the making and recording of the deed to Reynolds was fraudulent on the part of the husband, but we are of the opinion that fraud on the part of the wife has not been shown, and that she is entitled to the land for which she holds

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a deed, as against the plaintiff. When the agreement for the sale of the farm to Reynolds was made, she had no knowledge of the claim of plaintiff, nor did she know of it until after Reynolds had made full payment. She did not know that her husband was insolvent. After the Reynolds agreement was made, she commenced negotiations for the land in question; and on the first day of October, 1886, entered into a contract for its purchase, and paid thereon the sum of fifty dollars. Even had she known of plaintiff's claim when his action was commenced, she would have been authorized to protect her interest in the land conveyed, provided that in so doing she acted in good faith, and without any intent to defraud the plaintiff. The evidence fails to show that she participated in the alleged fraud of her husband.

II. It is claimed that Mrs. Lawrence paid her money in the purchase of the farm without any agreement that it should be refunded to her, and, therefore, that she cannot now claim it, nor the proceeds thereof, as against her husband's creditors. But the evidence satisfies us that she never intended to relinquish her right to the money, nor to the property in which it was invested, and that her right to it, and to its proceeds, was at all times recognized by her husband. The judgment of the district court is

AFFIRMED.

THE MERCHANTS' UNION BARB-WIRE COMPANY V.
THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY.

79	618
91	539
79	613
95	79
79	618
119	357

**Railroads in Streets: DAMAGES TO LOT-OWNERS: TITLES: ACQUIES-
CENCE: JOINT TENANCY.** In 1874, Y. and W. were the joint owners of lots abutting upon a city street on which defendant's railroad tracks are now laid, and plaintiff, as the grantee of Y. and W., by an action in equity, seeks to recover damages, under section 464 of the Code, for such use of the street, and to abate the tracks as a nuisance. The track nearest to plaintiff's lots was laid in 1870, when lot-owners had no legal right to object or to demand

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damages. Y., one of the owners in 1874, at that time consented to the laying down of the other track, of which alone complaint is made, though almost the whole street was at that time, and is yet, occupied with defendant's tracks and used for railroad purposes. No complaint was made of the track in question by any owner of the lots in question until 1883, eight and one-half years after it had been laid down. *Held*—

- (1) That Y.'s consent to the laying of the track, though merely oral, was binding on himself, and also, under the circumstances, on his co-tenant W., and that neither they nor their grantee could recover damages or object to the track, especially after so long acquiescence. (See *Pratt v. Railway Co.*, 72 Iowa, 249.)
- (2) That the fact that another person held a tax title on the lots in 1874 was immaterial, as Y. and W. afterwards acquired that title also, and their continuing acquiescence in the use of the street was equivalent to a new parol license.
- (3) That the fact that the tracks were laid in the usual manner, with the rails above ground, and not planked between, so as to make a level street, and that cars which were filthy and offensive were allowed to stand thereon, was no ground for damages,—such use of the street appearing to be according to common usage in such cases, and fairly within the contemplation of the parties when consent to lay the tracks was given, and the owners of the lots having for so long a time acquiesced in such use.

Appeal from Polk District Court. — HON. JOSIAH GIVEN, Judge.

FILED, FEBRUARY 12, 1890.

THE plaintiff is the owner of certain lots, which are bounded by Vine street, in the city of Des Moines. This action was brought to recover damages for the alleged unlawful laying down and operating two railroad sidetracks in said street, opposite to said lots. There was a trial upon the merits, and the petition was dismissed. Plaintiff appeals.

Whiting S. Clark, for appellant.

Thos. S. Wright and Cummins & Wright, for appellee.

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ROTHROCK, C. J.—I. The action was commenced on December 22, 1883. An answer was filed, and, on the seventh day of May, 1885, the plaintiff demurred to the answer. The demurrer was sustained, and an appeal was taken to this court, and the ruling of the district court sustaining the demurrer was affirmed. See 70 Iowa, 105. When the cause was remanded to the court below, the defendant withdrew its answer, and on its motion the plaintiff was required to divide the petition into separate counts, and an amended and substituted petition in equity was filed, in which judgment was demanded for damages, and an injunction was asked to abate and remove the sidetracks from the street, on the ground that they constituted a nuisance. This amended and substituted petition was answered at great length. It is not deemed necessary to set out the averments of the answer in full.

By the original petition and answer several questions were presented, which were considered by this court on the former appeal. One of the tracks, being the one on the south, and nearest plaintiff's property, was laid down in the year 1870, and it was determined on the former appeal that at that time the "cities of this state had no authority to permit or prohibit the construction of railroads over or along their streets," and that the owners of lots abutting on the streets could not recover damages for the use and occupancy of the streets by railroads. It was further said in that opinion that "defendant, having commenced the use of the first sidetrack at the time when it was authorized so to do, free from the claim of abutting lot-owners for damages, cannot now be made liable therefor." This would seem to have disposed of the claim for damages arising from the construction of the first or southerly track, unless there might be some foundation for a claim for damages for improper use of the track to the injury of the plaintiff. But it was held in the former opinion that, as the more northerly sidetrack was laid in the year 1874, the owner of the abutting property is entitled to recover

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damages under section 464 of the Code, which is as follows: "They [the city council] shall also have the power to authorize or forbid the location or laying down of tracks for railways and street railways, on all streets, alleys and public places; but no railway track can thus be located and laid down until after the injury to property abutting upon the street, alley or public places upon which such railway track is proposed to be located and laid down has been ascertained, and compensated in the manner provided for [taking private property for works of internal improvement, in chapter four of title ten of the Code of 1873]." It will be seen, by reference to the former opinion, that both tracks were authorized to be laid down by the city council. It was averred in the answer that the northerly track was laid down in pursuance of a resolution of the city council, which was adopted upon the petition of certain owners of lots abutting upon the street. It is stated in the opinion on the former appeal that "it is not averred that the owners of the lots upon which plaintiff's manufactory is situated united in the petition."

In the answer filed after the cause was remanded, the following among other averments were made: "(2) And for further answer to the substituted petition, and all amendments thereto, defendant says that the tracks, and each of them, mentioned, were laid with the written consent of the persons named in defendant's previous answers herein, at the times in said answer stated; and, in addition to the said written consent, defendant had a verbal consent of all persons interested in the property abutting on the street where said tracks were laid, and that with such consent, both verbal and written, said tracks were laid at the place and in the manner they are laid, and have been maintained and operated at said place, and in the manner constructed and in the way operated, ever since. They were so laid with full knowledge and acquiescence of all persons interested in said property, up to the time of the bringing of this suit; and the said tracks thus

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located, constructed and used were, by the persons interested in said real estate, including this plaintiff, for many years prior to this action utilized as appurtenant to said premises."

The issues having thus been made up, the court, with the consent of the parties, entered an order transferring the cause to the equity side of the court, and a full trial was had in accord with the forms of equitable proceedings, and the cause stands for trial in this court anew, and it is to be determined upon a preponderance of the evidence. Much of the argument of counsel is devoted to the question whether the laying down of the track in 1874 was in the nature of a permanent structure, for which the damages were entire, so that the statute of limitations was put in operation when the structure was completed; and counsel have discussed at great length what is claimed to be a conflict between the cases of *Cain v. Railway Co.*, 54 Iowa, 255, and other cases, on the one hand, and the opinion in this case on the former appeal, and the late case of *Pratt v. Railway Co.*, 72 Iowa, 249, on the other hand. We do not think it is necessary to enter upon a discussion of this question, further than to say that in *Cain's case*, the sidetrack in controversy was laid down in direct violation of an ordinance of the city, while in the case at bar and in *Pratt's case*, the tracks claimed to be nuisances were laid down and operated by the express authority of the city council; and we may say, further, that this court has not at any time determined that, when a railroad track has been laid down in a street with the permission of the city council, successive actions for damages may be maintained by an owner of abutting lots. We are of the opinion, however, that this case should be determined upon the issue presented by the averments of the answer, which we have above set out. The issue is squarely presented whether the track last laid down was constructed in pursuance of a parol license of the then owners of the lots which are now owned by the plaintiff. If the then owners, either

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in writing or by parol, joined with the owners of the other lots abutting on the street in an agreement that the track might be laid down and operated, and in pursuance of that agreement the defendant laid down its track, and has continued to operate it, the case surely presents all the elements of estoppel, not only as against the then owners of the lots, but as against their subsequent assignees or grantees. A subsequent grantee of the lots would be charged with notice of all of the rights of the defendant, from the fact that it was in possession of that part of the street upon which the track was laid.

We now come to a consideration of the facts which we think are established either without conflict or by a fair preponderance of the evidence. In the year 1874 the lots in controversy were owned by Dyer H. Young and John E. Williams. They acquired the title from S. R. Ingham in the year 1866. Before the sidetrack was laid, in 1874, one Ankeny, who was part owner of an oil mill on the same side of the street, and west of the lots belonging to Williams and Young, circulated a petition among the lot-owners, by which those who signed it consented to the laying down of the track. While it is true that neither Young nor Williams signed this petition, yet we think it is fairly shown by the evidence that Young was present when the track was staked out by the engineer, and that he assented to it as fully as the other property-owners along the south side of the street. It was a matter of discussion among the property-owners, and all of them appear to have been aware of the fact, that at that time abutting property-owners were to be consulted, at least, before a street could be appropriated for the use of railroad tracks. We have said that Young and Williams were then the owners of the lots. It is claimed by counsel for appellant that at that time James Callanan held a tax title to the lots. This we regard as wholly immaterial. This is not an action for ejectment for the trial of adverse claims of title. If Young and Williams

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were the owners of the patent title, as they appear to have been, and gave their consent to lay down the track, such consent must be regarded as continuing. They acquired whatever right Callanan had by a conveyance from him long before the plaintiff purchased the lots, and by their subsequent acquiescence in the use of the track they were bound the same as if they had given a new parol license after they acquired whatever interest Callanan had by virtue of his tax title.

Another strong circumstance against any claim for equitable relief on the part of the plaintiff is that, so far as appears, neither Young nor Williams, nor any other owner of the property, made any complaint of the occupation of the street from May, 1874, until this suit was brought, in December, 1883,—a period of about eight and a half years. The plaintiff purchased the lots in the year 1882, with both tracks of which it complains in the street, and in use by the railway company. Another fact which is entitled to consideration is that nearly the whole width of Vine street was, prior to 1874, used as a railroad street, and, from a point east of plaintiff's lots west to the Des Moines river, there are and have been four railroad tracks along the street, and on either side there is a barb-wire factory, a linseed-oil mill, a soap factory, flouring mill, etc., and travel by ordinary vehicles along the street, except at the outer edges, has not been practicable. The main line of the road, which is a great thoroughfare from east to west, runs through the street, and a passenger depot is located nearly opposite to the plaintiff's lots. All these circumstances appear to us to be very strongly corroborative of the testimony of the witnesses who state that the sidetrack in question was laid down with the consent of the owners.

But it is claimed that no consent of Williams, who was an owner in common with Young, was shown by the testimony of any witness. It may be the law that the consent of one tenant in common that the land held

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in common may be appropriated for right of way for a railroad will not bind his co-tenant; that a conveyance by him for that purpose is good only for his own interest; or that the exercise of eminent domain by condemnation proceedings, when but one of two owners is made a party, is not binding on the other. But that is not the question presented for our consideration. The owners of lots abutting on a street have no title to the street. When a railroad track is laid in the street, the land abutting on the street is not appropriated to a public use. The right of such an owner is not within the constitutional provision requiring just compensation to be made to the owner of land appropriated for public use. Without the statute above cited, the owner of abutting property is not entitled to damages, and, under the statute, his claim is one for damages only. We think that, under the facts of this case, taking into consideration the lapse of time and the notoriety of the occupation of the street, and the further fact that the track which was lawfully laid in 1870 is the one nearest to plaintiff's lots, the plaintiff has not shown that it is entitled to equitable relief on account of the appropriation of that part of the street in which the track was laid in 1874. That it was competent for the then owners to waive their right to damages by parol, and that such waiver cannot be revoked by their guarantee, was held in *Pratt v. Railway Co.*, 72 Iowa, 249. It was a mere claim of damages to the lots, and, even if the consent of Williams was not expressly shown, we think that such a consent could be made by Young, and that it would bind Williams, especially in view of the circumstances to which we have called attention.

II. It is claimed that the plaintiff is entitled to damages because the railroad tracks are laid in the usual manner, with the rails above ground, and not planked between, so as to make a level street, as is usual at street crossings; and that the tracks have been improperly used, by allowing cars to

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be stopped thereon, which at times have been filthy and offensive. As we have found that the remote grantors of the plaintiff consented to the laying down of the track which was laid in 1874, and that the track laid in 1870 was lawfully laid, the defendant had the right to occupy and use its said tracks in the ordinary and usual manner of using such tracks, and we find no evidence in the record that they were used otherwise. The consent to lay the track was given, and it does not appear that any claim or demand was ever made that the surface of the street should be raised to a level with the top of the iron rails, and it is fair to be presumed, from the long acquiescence in the use, that the track was constructed as it was intended by the owners of abutting lots that it should be.

We have thus disposed of this cause without determining the question of the statute of limitations. It appears to us, after a full and thorough examination of the whole record, that the plaintiff has no just ground of complaint, and that it has no legal or equitable right to recover damages of the defendant. The decree of the district court will be **AFFIRMED.**

HOOD V. SMITH *et al.*

Contracts: EXCHANGE OF LANDS: MUTUAL MISTAKE: RESCISSION IN EQUITY: ACTION BASED ON FRAUD. Where plaintiff conveyed his farm to defendant for land which neither of them had seen, being situate in a distant state, but which defendant said he believed, from what he had heard of it, would make a good stock farm, but which the evidence (see opinion) shows was not fit for that purpose, and was of little value for any purpose, *held* that there was a mutual mistake,—on the part of defendant as to the kind of land he was conveying, and on the part of plaintiff as to the kind of land he was getting,—and that equity would compel a restoration, even though the action was based upon alleged fraudulent representations upon the part of defendant, which were not proved. (Compare *Swezey v. Collins*, 36 Iowa, 589, and other cases cited in opinion.)

79	621
86	288
79	621
99	555
79	621
118	818
118	630
79	621
123	589
79	621
132	344
79	621
138	592

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Appeal from Union District Court.—HON. R. C. HENRY, Judge.

FILED, FEBRUARY 12, 1890.

ACTION in equity to set aside a contract for the sale of lands. Decree for plaintiff, and defendants appeal.

Maxwell & Leonard and *Jas. G. Bull*, for appellants.

McDill & Sullivan, for appellee.

GRANGER, J.—I. Plaintiff and defendant, Estella C. Hood and Celesta A. Smith, are, respectively, the wives of J. C. Hood and H. M. Smith, and as, in the transaction which is the subject-matter of this action, the husbands were the agents and negotiators, in our consideration of the case we will refer to them as the parties, for convenience.

In February, 1887, the plaintiff owned one hundred and twenty acres of land in Union county, Iowa, on which there was a mortgage of two thousand dollars. The defendant Smith, at the same time, owned a half section of land in Custer county, Nebraska. Hood and Smith met at Creston, Iowa, and negotiated an exchange of lands; Hood being allowed by the terms of the trade to retain the use of the Union county land for the year 1887, and he to pay the taxes for that year. The consideration paid by Smith for the Union county land was the Nebraska land, the two-thousand-dollar incumbrance on the Union county land, and the use of the land for the year 1887. The estimates placed upon the lands by their owners in their negotiations were thirty-five dollars per acre for the Union county land, and eight dollars per acre for the Nebraska land. Neither Smith nor Hood had ever seen the Nebraska land, and it is claimed in this action that Hood purchased it relying on Smith's representations that it was good farming land, and would make a good stock farm; and we are

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asked to rescind the contract of sale on the ground that such representations were false. With regard to the true character of the Nebraska land, our examination of the evidence satisfies us that it was not good farm land, or suitable for a good stock farm. The testimony as to its character is not entirely harmonious, yet it is so strong in favor of our conclusion as to leave little room for doubt as to its correctness.

The most reliable evidence of the character of the land, we think, is from residents of Nebraska, who reside in its neighborhood. Some seven such witnesses have been examined,—four for plaintiff, and three for defendant. All the witnesses agree that the land is badly cut by canons or gullies. They do not entirely agree as to the extent of such canons. One Peet, examined for plaintiff, says of the land that it is too rough for stock-raising, or raising corn, oats or wheat; that several ravines run through it eighty feet deep, and from two hundred to six hundred feet wide; that they damage the land seventy-five per cent. for farming purposes; that good farming land (uncultivated) is worth from ten to twelve dollars per acre; that the land in question is worth \$2.50 per acre; that one quarter section contains five acres of plow land, and the other fifteen acres. The other three witnesses, examined for plaintiff, fix the amount of plow land at from fifteen acres to twenty-five on the half section. They fix the value of the land at from two dollars to \$2.50 per acre. Three of them say, in terms, that the land is not suitable for a stock farm; and, while the other says "the place is fair for stock-raising," he also says "it is not fit for raising corn, wheat or oats;" "not good farming land;" "not good hay land." This witness lives half a mile west of the land, and fixes its value at \$2.50 per acre. These witnesses, all in a general way, corroborate the witness Peet as to the canons and general topography of the land. A Mr. Johnson, examined for defendant, describes the land as rough, except two pieces,—one of five acres, and one of twenty acres. He says the canons are deep cuts, and there are three

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of them on the land; that any of the land would produce grass, and that, aside from about twenty acres, the land is rolling and rough; that it would not be a good farm for raising grain, but all right to pasture stock. One Hummell, for defendant, says one hundred acres of the land could be plowed, and would do for raising grain, and the balance would make good pasture. A Mr. Norsoorth, also for the defendant, speaks of the land as mostly rolling, with two pieces of table-land, and says it is good hay land, with rich soil. He says it is worth \$15.50 per acre and was in 1887 worth six dollars per acre.

This is a summary of but a part of the testimony on this branch of the case. Other witnesses, including the defendant H. M. Smith, gave testimony in this respect; but, when all considered, it must be conceded that the land was not suitable for a good stock farm. We think the difference in the conclusion of the witnesses as to the adaptability of the land, both for culture and stock-raising, arises from the fact that each has in view different standards of utility. Perhaps, in better terms, it may be said that some are testifying as to the practical adaptation of the land, and others as to purposes for which it could be used. For instance, some speak of "good plow land," or use an equivalent term, and others of land that "could be plowed." None of the Nebraska witnesses say, in terms, that the land is suitable for a good stock farm, or for general culture, although it is perhaps fair to infer that two of them mean that. Their conclusions are somewhat doubtful. Our conclusion, from all the testimony, is that the land is not adapted for use, when improved, as a good farm, either for stock-raising or general culture.

II. It is next a question if the transaction involves facts which entitle the plaintiff to a rescission of the contract. It is pressed in argument by plaintiff that the transaction involves a fraud on the part of Smith which entitles her to a rescission, and very much testimony is directed to that question; but, with our view of the case,

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it is unnecessary to decide any question as to a fraudulent purpose. We think there is a practically conceded state of facts, barring that of the true character of the land, upon which the case may be decided, and such a course is certainly to be preferred to reconciling disputed questions of fact.

The evidence all tends to show, and it is nowhere questioned, that Hood designed to and supposed he was getting land suitable for a good stock farm. The contention by appellant is that, if he did not get it, it was his own fault, and not the result of misrepresentations by him. Taking this much, then, for granted as to the purpose of Hood, we next look to the conduct or purpose of Smith, to see if it is such as, when taken with that of Hood, should avoid the sale. A brief extract from the testimony of H. M. Smith will be sufficient for our purpose, and it is as follows: "We made the trade, and entered into a contract. There was a sectional map of Nebraska on the wall during all these interviews, giving the distance from one place to another. It showed the Union Pacific railroad and the town of Gothamburg. It showed townships and sections. We traced the distance from Gothamburg by county sections. I had never seen the land. Never had been in Custer county. He asked me about the land. I told him I could not describe it; that I had never seen it, any more than I had heard that it was fair land, and I believed it would make a good stock farm." Nothing in all the record in any manner contradicts this. Smith's information then was, which he had no reason to disbelieve, that it was fair land, and would make a good stock farm. Then we must assume that Smith supposed he was selling to Hood land for a good stock farm, and Hood supposed he was getting such. What, then, is a legitimate conclusion? A mutual mistake. Hood did not get such land as he supposed he was buying. Smith did not convey such land as he supposed he was selling. Both were mistaken. Natural justice, in such a case, demands that the parties themselves should

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restore the property taken, and, if one refuses, equity will compel a restoration.

III. It remains to be seen if the relief can be granted in such case, where it is asked on the ground of fraud. That it may be is clearly ruled in *Swezey v. Collins*, 36 Iowa, 589, and the ruling has strong support in *Wilcox v. University*, 32 Iowa, 367; *Seeberger v. Hobert*, 55 Iowa, 756; and *Mohler v. Carder*, 73 Iowa, 582. The judgment of the district court is right, and is
AFFIRMED.

 COLLINS V. VALLEAU.

 VAN RIPER *et al.* v. THE SAME.

1. **Tax Sale and Deed: TAXES NOT BROUGHT FORWARD: ERROR CURED BY TIME AND POSSESSION.** Where land was sold in the year 1867 for the taxes of 1866, which were not brought forward upon the tax list of 1867, as required by section 845 of the Code, *held* that the defect was cured, as against the owner of the patent title, by the lapse of fifteen years, and the actual, open and notorious possession of the land during the last eight of those years by the holders of the tax title. (See *Griffin v. Bruce*, 73 Iowa, 126.)
2. **Evidence: RECORDS OF DEEDS WITHOUT REVENUE STAMPS.** The record of a deed executed when revenue stamps were required to be affixed to deeds is admissible in evidence, even though the record does not show that revenue stamps were affixed to the original deed; for, in the absence of a contrary showing, that will be presumed, since it was the duty of recorders to refuse to record such instruments until the proper stamps were affixed, and he was under no obligation to copy or refer to the stamps in the record. (This point elaborated and affirmed in opinion on rehearing.)
3. **——: RECORD OF CERTIFIED COPY OF RECORD.** A power of attorney was originally filed and recorded in Woodbury county, to which O'Brien county was at the time attached. Afterwards a certified copy of the record in Woodbury county was recorded in O'Brien county. *Held* that the record in O'Brien county was admissible in evidence without a showing that it was the same as the record in Woodbury county; for that will be presumed, in the absence of evidence to the contrary.

79	626
88	436

79	626
111	210

79	626
112	727

79	626
117	531

79	626
134	162

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4. **Acknowledgments: DEFECTS CURED BY STATUTE.** A defective acknowledgment of a power of attorney, executed in 1867, and duly recorded in this state prior to the taking effect of section 1967 of the Code, is cured by that section. (See *Brinton v. Seevers*, 12 Iowa, 389.)
5. **Appeal: ARGUMENT: ESTOPPEL BY RECORD.** Counsel cannot be permitted, in his argument in this court, to deny in his reply a fact which is shown by the testimony set out in his abstract, and which he has admitted by implication in his opening argument.
6. **Evidence: DOCUMENTS NOT FILED AS PER ORDER.** Where in an equity case there was an order that the oral evidence should be taken in the form of depositions, and all documentary evidence filed with the clerk before trial, it was not error to admit documentary evidence not so filed; but, if the adverse parties were taken by surprise, they would have been entitled to a continuance upon application therefor.

Appeal from O'Brien District Court.—HON. SCOTT M. LADD, Judge.

FILED, OCTOBER 12, 1889.

THESE actions involve the title to certain lands in O'Brien county. The plaintiffs claim to be the owners under the patent title; and the defendant claims title under certain tax sales and deeds. The actions are in equity, and were tried together as one case, and there was a decree dismissing the petition. Plaintiffs appeal.

H. E. Long, for appellants.

M. H. Allen and *L. Bullis*, for appellees.

ROTHROCK, J.—I. It appears from the evidence that part of the land was patented by the United States to one George L. Fobert in the year 1857, and that the residue was patented to one Richard Van Riper in the year 1859. Benjamin Collins, the plaintiff in one of the cases, acquired title under the patent in March, 1858, and the plaintiffs in the other case are the widow and children of Van Riper, the patentee. There is no evidence that any of the plaintiffs or their grantors have at any time paid any taxes on any of the

1. Tax sale and deed: taxes not brought forward: error cured by time and possession.

land. All of the land was sold by the treasurer of O'Brien county on the twenty-second day of December, 1860, for the delinquent taxes of 1858 and 1859. A treasurer's deed was afterwards executed in pursuance of said sale, but it is conceded by counsel for the respective parties that said deed was void, as there was no authority nor power vested in the treasurer of O'Brien county to sell land for the delinquent taxes for the years above named. This was determined by this court in the case of *Hilliard v. Griffin*, 72 Iowa, 331. It further appears from the evidence that the lands in controversy were again sold at tax sale on the ninth day of December, 1867, for the delinquent taxes of 1866, and that one Thomas J. Stone was the purchaser at said sale. On the twenty-eighth day of December, 1870, the treasurer executed and delivered a deed to said Stone in pursuance of said sale. It is claimed by counsel for appellants that this last deed is void, because the taxes for the year 1866 were not carried forward upon the tax list of 1867; and we are cited to the case of *Gardner v. Early*, 69 Iowa, 42. But that case has no application to the cases at bar. These actions were commenced on the sixth day of March, 1886, more than fifteen years after the tax deed was executed, and more than eight years after the grantors of the defendant were in actual, open and notorious possession of the land. Said possession has been continuous until the present time. The irregularity in failing to carry forward the delinquent tax has been cured by the lapse of time and the possession. This question was expressly so determined in the case of *Griffin v. Bruce*, 73 Iowa, 126.

II. There can be no doubt that the defendant's title under the tax sale and deed to Stone is valid, unless she has failed to show that she holds under that deed. We will proceed to notice some of the objections made by counsel to her title under the tax deed. Some of the conveyances by remote grantors were

2. EVIDENCE:
records of
deeds with-
out revenue
stamps.

Collins v. Vallean.

executed at a time when, by the laws of the United States, internal revenue stamps were required to be placed upon conveyances of land. The records of said deeds were offered in evidence, and objection was made that the records were not competent evidence, because they did not show that revenue stamps were affixed to the original deeds. There is no merit in this objection. If it were shown to be a fact that no revenue stamps were affixed to the original instruments, they would still be admissible in evidence, unless it was made to appear that there was a fraudulent intent in the omission to properly stamp the papers. *Mitchell v. Insurance Co.*, 32 Iowa, 421.

III. A link in the chain of title consisted of a power of attorney authorizing the conveyance of the land. The original power of attorney was
a. —: record of certified copy of record. recorded in Woodbury county, to which O'Brien county was formerly attached. Afterwards a certified copy of the record in Woodbury county was recorded in O'Brien county. The defendant testified as a witness that she did not have possession nor control of the instrument purporting to be recorded in O'Brien county. Objection was made to the introduction of the record in O'Brien county because it was a copy of a copy, and objection was made to the introduction of the record in Woodbury county because it was not shown that the two records were the same, and that the defendant did not have possession or control of the original of the record in Woodbury county. This objection was without merit. In the absence of some showing in the evidence, it should be presumed that the records were alike. The objection is too technical to demand discussion.

IV. It is further objected that the power of attorney was not acknowledged as required by the laws of Iowa. The defective acknowledgment
4. ACKNOWLEDGMENTS: defects cured by statute. was executed in the year 1867. By section 1967 of the Code all acknowledgments of all deeds, mortgages or other instruments in writing,

Collins v. Valteau.

taken and certified previous to April 30, 1872, and which had been duly recorded, were declared valid in all courts of this state, "anything in the laws of the territory or state of Iowa to the contrary notwithstanding." This power of attorney was duly recorded before the above provision of the Code took effect. There can be no doubt that if the acknowledgment of the power of attorney was defective it was cured by this curative act. See *Brinton v. Seevers*, 12 Iowa, 389.

V. It is stated in the argument of appellant, in reply, that the record does not show that the tax deed to Stone has ever been recorded. We cannot permit counsel to make this question in his reply. It appears in the abstract from the testimony of appellee that she did not have the possession of the treasurer's tax deed to T. J. Stone, and recorded in Book D, page 469; and in the opening argument of counsel the following language is used: "No internal revenue stamp was attached to the record of the tax deed from O'Brien county to Stone." Counsel cannot be permitted, in his reply, to deny that the deed was recorded, in the face of his abstract and argument.

VI. At a term previous to the term at which the case was tried the court made an order that all the oral evidence should be taken in the form of depositions, and all documentary evidence to be filed with the clerk of the court before the trial of the cause. The plaintiffs objected to the introduction of the records of deeds, because the defendant did not comply with this order; and counsel seems to be of opinion that there should be a decree for the plaintiffs because the court admitted the record evidence. We think otherwise. If the plaintiffs were taken by surprise by these records, they should have moved for a continuance, to enable them to rebut them. We have examined all material questions in the case, and are of opinion that the decree of the district court should be

AFFIRMED.

5. APPEAL: argument: es-
toppel by
record.

6. EVIDENCE:
documents
not filed as
per order.

OPINION ON REHEARING.

[FILED, FEBRUARY 12, 1890.]

ROTHROCK, C. J.—In a petition for rehearing filed by counsel for appellants, we are requested to re-examine the question determined in the second point of the foregoing opinion. It is claimed that although, in the absence of fraud, the original instruments would be admissible in evidence although not stamped, yet that the stamp act provided that a record of an unstamped instrument should “be utterly void, and shall not be introduced in evidence.” There was no evidence that the instruments in question in this case were unstamped, except what might be inferred from the fact that the record does not show that stamps were affixed to the original instruments. It is not claimed that any act of congress required a recorder to make a copy of the stamp in the record, nor to refer to it in any way in reading the record. It was the duty of the recorder to refuse to record the instruments until proper stamps were affixed, and we will, therefore, presume that the originals were stamped. We are cited to the case of *Switzer v. Knapps*, 10 Iowa, 72, as an authority in support of appellants’ position. It is true that it is said in that case that “a copy of a deed without any mark indicating a seal is evidence that there was none.” But it appeared in that case that the deed was not in fact under seal; and, so far as we are able to understand the facts of the case, the question was whether the record imparted notice to third persons. If it be conceded that the deed was not in fact under seal, the question as to what presumption should obtain in case the record did not show that the original was under seal was not in that case. Other authorities are cited by counsel. As we understand them, they do not present the question now under consideration. They do not determine that the recorder should undertake to copy the stamp, or make reference thereto in the record,

Gorrell v. Gates.

nor what presumption should obtain in the absence of such reference.

In conclusion, we have to say that we would hesitate long before sustaining the claim made by counsel. The record evidence of titles to real estate is of too much importance to be held void for the mere omission of recorders of deed to make memorandum that stamps were attached to deeds. We should rather presume that the recorders did their duty, and recorded such instruments only as were properly stamped. We adhere to our original opinion, and the decree is

AFFIRMED.

GORRELL *et al.* v. GATES *et al.*

1. **Parties to Actions: CREDITOR'S BILL: JOINDER OF SEVERAL CREDITORS.** Several judgment creditors may join in an action against the trustee of their common debtor, alleging that they have no adequate remedy at law, and seeking the discovery of property which may be subjected to the payment of their judgments, and asking that the trustee be required to discharge certain alleged duties, which it is claimed would result in placing property of the judgment debtor within the reach of legal process. (See opinion for statutes and cases cited.)
2. **Creditor's Bill: PLEADING.** In an action against a trustee of the debtor under a will, to discover assets of the debtor and to compel the trustee to perform his duties, to the end that the debtor's property might become subject to execution, the petition alleged that three certain tracts of land had been set apart to the trustee, and the title thereto decreed in him, for the uses and purposes authorized by the will, and that said land was so set apart by partition, which, however, did not include all the realty of the decedent. *Held* that plaintiffs were improperly required, upon motion, to state the value of each of said tracts of land, on the ground that, having been set apart to the trustee, if their aggregate value was greater than the claims of plaintiffs, their action could not be maintained; for the petition further showed that the will made it the duty of the trustee to provide money for many purposes pertaining to the welfare of the judgment debtor, and it did not appear for what obligations of that kind the land might be already liable; so that the fact, if it so appeared, that the land would sell for more than enough to satisfy plaintiff's claims, could not affect their right to maintain the action.

79	632
84	576

79	633
103	164

Gorrell v. Gates.

Appeal from Jasper District Court.—HON. DAVID
RYAN, Judge.

FILED, FEBRUARY 12, 1890.

ACTION in equity to discover and subject property to the payment of certain judgments. The court below sustained a motion to strike from the petition and for a more specific statement. Plaintiffs refused to amend, and the court dismissed their cause of action, and rendered judgment in favor of defendants for costs. The plaintiffs appeal.

Winslow & Varnum, for appellants.

No appearance for appellees.

ROBINSON, J.—The averments of the petition material for our consideration are in substance as follows: E. N. Gates, by his last will, including codicils, provided that the larger part of his estate should be divided equally between his wife, Sarah E. Gates, and his sons, Sumner E. Gates, A. C. Gates and Lorin A. Gates, all of whom are parties defendant. Sumner was appointed executor of the will, and was directed to sell all the property of the testator within a specified time after his death, and not to allow any considerable amount of money to remain in his hands undivided, but that he should divide it, and all property of the estate, as aforesaid. Defendant George I. Anderson was appointed trustee by the will, and was authorized to receive from the executor the share of the estate which was given to A. C. Gates, and care for and manage it, excepting such sums of money as, in the opinion of the trustee, might be needed to make said A. C. Gates and his child or children comfortable, and for educational purposes; and such further sum as, in the judgment of the trustee, it would be prudent to intrust to said A. C. Gates as a fund upon which to engage in business. The will, including

Gorrell v. Gates.

codicils, was admitted to probate on the twenty-fourth day of April, 1883; and the executor and trustee appointed thereby qualified and entered upon the discharge of the duties of their respective offices. The first and second paragraphs of the petition allege that plaintiff J. R. Gorrell obtained a judgment against A. C. Gates on the twenty-first day of April, 1887, for the sum of \$692.13, besides costs, and that said judgment was rendered for rents due for a dwelling house used and occupied by said A. C. Gates since the death of his father. The third paragraph of the petition shows that plaintiff J. R. Zallinger recovered a judgment against said A. C. Gates in the year 1889 for the sum of \$675.70, besides costs, for groceries necessary for said A. C. Gates and his family, purchased since the death of his father. Execution was issued on the Gorrell judgment, and the executor and trustee were garnished thereunder, but each appeared and denied indebtedness, and denied having property in their possession or under their control which belonged to the judgment debtor. No property exists for the satisfaction of the judgments, unless that in the hands of the executor and trustee can be reached for that purpose.

The petition further alleges that the executor has failed to discharge the duties imposed upon him by the will, in that he has failed to dispose of the property of the estate, and pay to the trustee the share which belongs to said A. C. Gates; and has failed and refused to do so for the express purpose of preventing such share from passing into the hands of the trustee, and allowing it to be used to satisfy the judgments of plaintiffs. The trustee is also charged with neglect of duty. The plaintiffs ask that defendants be compelled to make discovery of the property belonging to the estate of decedent at the date of his death, and the disposition made of it, and of its proceeds; that the executor be directed to make sale of property to pay the trustee a sufficient amount to satisfy the judgments aforesaid, and that the trustee be required to make payments therefor; and

for such other relief as they may be entitled to under the facts stated in the petition.

I. The first part of the motion asked that the name of J. R. Zallinger and the third paragraph, or the name of J. R. Gorrell and the first and second paragraphs, be stricken from the petition.

1. PARTIES to
actions: cred-
itor's bill:
joinder of
several credi-
tors.

The plaintiffs refusing to make an election, the court struck out the name and paragraph first mentioned. The question presented by that ruling is whether the averments of the petition show that the plaintiffs have such a common interest in the relief sought as entitles them to join in this action. The right of either of them to that relief is not raised, and cannot be determined on this appeal. Section 2545 of the Code is as follows: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except where it is otherwise provided in this Code." Persons having an interest in the matter in litigation, in the success of either of the parties to the action, or against both, are entitled to intervene, and, in a proper case, may unite with the plaintiff in claiming what is sought by the petition. Code, sec. 2683. It is the policy of the law to avoid a multiplicity of suits, and an identity of interests is not always required to entitle persons to join as plaintiffs for the purpose of obtaining relief to which they are entitled. It was said in *De Louis v. Meek*, 2 G. Greene, 64, that, "where there is unity in interest as to the object to be attained * * * the parties seeking redress in chancery may join in the same complaint and maintain their action together. In such a case, it is within the province of a court of chancery to mete out to each and all of the complainants their rights, on the principle of sound equity. In that case the complainants claimed distinct interests in real estate, but desired the same relief, to-wit, the setting aside of a decree in partition alleged to have been fraudulently procured. The rule stated in the quotation was approved in *Powell v. Spaulding*, 3 G. Greene, 461, and in *Brandirff v. Harrison Co.*, 50 Iowa, 165. In the case last

cited it was held that the different owners of separate tracts of real estate could join in an action to restrain the collection of a tax illegally levied thereon. The rule was again approved in *Palo Alto Banking, etc., Co. v. Mahar*, 65 Iowa, 75, an action to restrain the conveyance of certain lands. In *Gates v. Boomer*, 17 Wis. 455, the right of the separate owners of judgments to join in an action to set aside a conveyance of the judgment debtor alleged to have been fraudulently made was affirmed. In *Meyers v. Fenn*, 5 Wall. 205, it was said that "the practice of permitting judgment creditors to come in and make themselves parties to the bill, and thereby obtain the benefit, assuming at the same time their portions of the costs and expenses of the litigation, is well settled." See, also, *Hamlin v. Wright*, 23 Wis. 492; Story, Eq. Pl., sec. 99; *Conro v. Iron Co.*, 12 Barb. 28; *Clarkson v. De Peyster*, 3 Paige, 320; *Strong v. Township*, 79 Ind. 209; Pom. Rem., secs. 248, 266, 267.

The petition in this case is, in effect, a creditor's bill. It alleges that plaintiffs have no adequate remedy at law for the enforcement of their rights.

2. CREDITOR'S bill: pleading. They seek the discovery of property which may be subjected to the payment of their judgments, and ask that the executor and trustee be required to discharge certain alleged duties, which it is claimed would result in placing property of the judgment debtor within the reach of legal process. The end each plaintiff seeks is, it is true, the collection of his own judgment; but it is claimed the relief sought would result in their mutual benefit. Their alleged rights of action rest upon substantially the same grounds, and whether they are entitled to the relief demanded can be ascertained as well in one action as in two. If the principal question be determined in their favor, the powers of a court of equity are ample to ascertain and enforce the particular rights of each. We think the case falls within the rule of the authorities cited.

II. The petition alleges that since the commencement of this action three tracts of land, described, have

Gorrell v. Gates.

been set apart to the trustee, and the title thereto decreed in him, for the uses and purposes authorized by the will. It further alleges that said land was so set apart by proceedings in partition, which did not, however, divide all the realty belonging to the estate of decedent. A part of the motion which was sustained asked that the plaintiffs be required to state the value of each of said tracts of land, on the ground that, having been set apart to the trustee, if their aggregate value is greater than the claims of plaintiffs, this action cannot be maintained. We do not think the ground is well taken. If it be the duty of the trustee to furnish money or other property for the satisfaction of the judgments, it is certainly not his only duty. He is required to furnish such sums of money as, in his opinion, are needed to make the judgment debtor and his child or children comfortable, and to educate the latter. He is also authorized to furnish the judgment debtor, if thought prudent, with a fund for business purposes. The land was taken by the trustee subject to and for the purposes of the trust created by the testator. For what obligations incurred by the trustee in the discharge of the duties of his office the land may be already liable does not appear. It was not the duty of plaintiffs to show that it was not available for the satisfaction of their claims, and under the facts disclosed by the petition no presumption arises that it was. If plaintiffs are entitled to the relief demanded they cannot be compelled to proceed against any particular part of the property which is included in the share of the judgment debtor. In no event could the stating of the value of the tracts of land in question have shown that plaintiffs were not entitled to maintain this action. We conclude that the motion should have been overruled. The judgment of the district court is

REVERSED.

VANNEST V. FLEMING.

1. **Waters: COLLECTION BY TILE DRAINS: CASTING ON LOWER ESTATE.** The owner of the dominant or higher estate has the right to conduct the water falling upon his land, by means of underground tile drains, into the channel provided by nature for the drainage of his land, and through such channel to cast it upon the servient or lower estate.
2. ———: **DRAINAGE BY ACQUIESCENCE: SUBSEQUENT CHANGE.** Where a drain or ditch has been established by the acquiescence of two adjoining land-owners, and it is required by the best interests of both owners, and the manner of its construction is in accord with the natural flow of the water, and the quantity of the water has not been increased nor its flow diverted by the owner of the higher land, the lower or servient owner cannot obstruct or abolish the ditch without the consent of the upper owner; and the rights and duties of the parties pass to their grantees with the land.
3. ———: **DRAINAGE BY AGREEMENT: SUBSEQUENT CHANGE.** Where a ditch for the drainage of surface water has been constructed jointly by two adjoining land-owners, under an oral agreement as to its course, etc., each party contributing labor or money to its construction, and they have recognized the ditch by plowing and farming in accord with it, neither can set aside or disregard it without the consent of the other.

Appeal from Mahaska District Court.—HON. J. K. JOHNSON, Judge.

FILED, FEBRUARY 12, 1890.

ACTION in chancery to enjoin defendant from interfering with the flow of water from plaintiff's land upon the adjoining lands of defendant. There was a decree granting part of the relief prayed for by plaintiff, and refusing part. Both parties appeal,—the defendant first, and he is therefore designated as "appellant."

John F. Lacey, W. R. Lacey and Bolton & McCoy,
for appellant.

Blanchard & Preston, for appellee.

79	638
84	110
79	638
91	291
91	295
79	638
93	661
79	638
97	364
79	638
106	170
79	638
126	337
79	638
127	177
127	178
127	180
127	533
127	553
79	638
131	128
131	516
79	638
139	4
139	417
140	575
140	727

BECK, J.—I. The petition is in two counts. The first alleges that plaintiff owns one hundred and sixty acres of land, and defendant owns an eight-acre tract adjacent thereto, on the west; that for many years there has been upon plaintiff's land a natural drain, or open ditch, two or three feet deep, being a natural water-course, which begins near the center of the track, and runs in a southwesterly direction, crossing the division line of defendant's land about twenty rods north of the southwest corner thereof, and thence across it; that this drain or water-course is the natural outlet of the water falling and accumulating upon a part of plaintiff's land, and is the natural drainage thereof; that defendant dammed up the drain at or near its entrance upon defendant's land, but the dam was washed out by the floods, and defendant threatens to rebuild it, and that the water arrested in its flow off of plaintiff's land, and caused to remain thereon by the dam, would prove to be a source of great injury thereto, which would prove irreparable, if the dam be permitted to remain.

The second count alleges that plaintiff and defendant, at the time being owners of their respective tracts of land, entered into an oral agreement that plaintiff should cause an open ditch to be dug, other than the one referred to in the first count, which should run westerly from the northwest part of plaintiff's land, and cross the line of defendant's land about thirty rods south of the northeast corner thereof, and should run thence upon defendant's land according to lines and distances set out in the petition, which need not be repeated here; that the parties should unite in constructing this ditch, each doing a part of the work, as stated in the petition; that each party was to have the right to connect tile drains with the ditch; and that defendant threatens to destroy the ditch, or drain, and render it useless, which would work great injury to plaintiff. The defendant, in answer to the first count, of the petition, after denying, generally, all allegations thereof, admits the existence of the ditch described in

Vannest v. Fleming.

the first count of the petition, but alleges that it is not a natural water-course, but an artificial ditch. He admits that he obstructed the ditch, but denies that the flow of the water was thereby interfered with, and alleges that plaintiff's land, at the place in question, is higher than defendant's land; that the ditch is not necessary for the proper drainage of plaintiff's land, the natural depression of the land being sufficient therefor; that it is his intention to fill up the ditch on his own land, but not to obstruct the flow of the water upon plaintiff's land; and that the ditch, with steep banks, is an injury to defendant's land.

In answer to the second count of the petition, defendant admits that the other ditch—the more northerly one—was dug at the mutual expense of the parties, pursuant to a verbal agreement made by the parties, which did not provide how long it should remain, but that it should be tiled in the future, if defendant so required, and that the ditch was not dug in compliance with the agreement. It is alleged that defendant now requires the ditch to be tiled, one-half of the expense whereof he proposes to pay.

Defendant, in a cross-petition, prays that plaintiff may be enjoined from collecting the water into the ditch described in the first count by tile drains, and thereby causing it to flow upon defendant's land. The cross-petition contains allegations in this language: "That defendant's land is lower than plaintiff's, and that the plaintiff's surface is drained naturally upon defendant's land, but that plaintiff has no lawful right, by drainage, to concentrate the underground water and to cause it to flow from a single point upon defendant's land, and that by so doing he has attempted to impose upon defendant's land a burden which it is not required by law to bear." The allegations of the cross-petition are denied by plaintiff in a proper pleading. Upon the final hearing on the merits, the court found the equities with defendant upon the first count of the petition, which was dismissed by the decree; and upon the second count the equities were found with plaintiff, and

the relief prayed for thereon was granted. The defendant's cross-petition was dismissed.

II. The evidence and the pleading show that plaintiff's land is the higher, and is naturally drained over defendant's land by two "sloughs," as they are called in the pleadings ("swales" is a better designation), which run from or through plaintiff's land to and over defendant's. There is no other way of carrying the surplus water, caused by snow and rains, off of and away from plaintiff's land, except through these swales. They also drain defendant's land, which has no other drainage. The case is not one of water, which would not naturally run upon defendant's land, being diverted and brought there by the unlawful acts of plaintiff, but is simply the case of the natural drainage of a tract of land through the swales prepared by nature for that very purpose. The two parties happen to own this tract of land; and the defendant, the owner of the servient estate, attempts to resist the undoubted right of plaintiff, the owner of the dominant estate, to have the surplus water falling upon his land conducted by nature's water-way off of his land to the brook, the creek and the river, the great natural drains of the country. The ground of this resistance is that this water from plaintiff's land passes over defendant's farm. But, as the water from defendant's land must pass over his neighbors' lands below him, which are servient to his lands, he is attempting to impose restrictions upon plaintiff which, with the same claim of right, could be imposed upon him, with equally disastrous results.

It is insisted that plaintiff is violating the law and rights of defendant by collecting the water — "under-ground water," it is called in defendant's pleadings—by tiles, and conducting it to defendant's land at one place, which, it is claimed, is not permitted by the law. It will be readily seen, upon a moment's reflection, by one having but a limited acquaintance with the subject,

1. WATERS:
collection by
tile drains:
casting on
lower estate.

Vannest v. Fleming.

upon the consideration of the facts developed in the evidence, that there is no difference between underground water, collected by tiling, and surface water. The first is water which would run off in a ditch, were one dug, without entering the earth. But it is permitted to enter the earth, and is then, by natural means, attracted and conducted to the tiles, and through them flows away. It must be remembered that the lands of both parties are used for cultivation with the plow. The fact is known by every intelligent observer, who has directed his eyes over the surface of our beautiful and fertile agricultural lands, that the swales are our most productive lands, while the sward of the prairie grass, and of other natural grasses, remains unbroken. There are no ditches or gutters in the swales. They, of course, are of various widths, depending largely upon the abruptness and height of the little hills or elevations of which they constitute the valleys. When the sward is broken by the plow, the water from rains and snows has a tendency to seek a channel down the swale, which will, of course, be no wider than is required to conduct away the surplus water falling on the land drained by the swale. This channel will soon become a ditch after the sward is broken; and, if left to nature, it will be sinuous, directed by the laws of nature, which give all water-courses that character. But the intelligent husbandman will aid water in this regard, and, with his plow or his shovel, will keep the ditches straight. He will not act the foolish part of attempting to do that which is impossible, namely, to keep the surplus water flowing over all the surface of the swale; for the reason that it would prove impossible, and, if successful, it would cost him his crops, and finally impoverish his land, by causing the fertile soil to be washed away. In the case before us, both parties, if they be intelligent farmers, do this very thing. Plaintiff, instead of an open ditch, put in tile, which subserves the same purpose. Now, these farmers are not diverting the water from the water-way provided by nature. They are not seeking to conduct the water contrary to the course of nature, or in a way

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it did not run before the soil became the property of man. When the use of the soil is changed from nature's husbandry, the production of grasses from meadows and pastures, to the cultivation of grain by means of the plow, nature continues to direct the water in channels. The plaintiff does not conduct the water to and upon defendant's land in a manner differing from that manner in which it was conducted before the land was plowed. The manner, in each instance, is nature's manner. Of course, the manner, in one instance, under the laws of nature, provides for a ditch ; in the other instances, the laws of nature, under which was produced the sward of the prairie grass, dispense with a ditch.

III. It is shown by the evidence—indeed, defendant himself so testifies—that the ditch referred to in the first count was made upon defendant's land, before he owned it, by the farmer who then owned and cultivated the land. It seems that defendant's grantor, and the plaintiff or his grantor, were in accord in their views as to the ditch, and its course through the two tracts of land, and, either by express agreement or by mutual and silent acquiescence in the manner pursued by each in the improvement, by drains, of their respective lands, agreed upon the construction of the ditch, and the line it should pursue. Its place of crossing the dividing line of the lands, in this manner, was settled. The law will not permit complaint to be now made of the location and manner of construction of the ditch, after it has been acquiesced in by the parties. The rights of the parties demand that the ditch should remain a settled matter. Good husbandry forbids the changing of ditches. Their permanence prevents the washing away of the soil, as well as avoids expenses in the change.

IV. Upon the first count of the petition, and defendant's cross-petition, we reach the conclusions: (1) That the ditch is required by the best interest of both proprietors ; (2) that the manner of its construction is in accord with the natural flow of the water ; (3)

2. — : drain-
age by ac-
quiescence :
subsequent
change.

Vannest v. Fleming.

that the quantity of the water has not been increased, and its flow has not been diverted, as charged; (4) that the ditch was established by the acquiescence of the proprietors, and that defendant threatens to interfere with, and change, the flow of the water, by building and maintaining a dam in the ditch; (5) that the ditch cannot be dispensed with, nor its course changed, without the consent of the parties interested. This conclusion is in accord with the doctrines of *Livingston v. McDonald*, 21 Iowa, 160, and is supported by familiar principles of the law. See *Pratt v. Lamson*, 2 Allen, 275.

V. The evidence very plainly leads to the conclusion of fact that the ditch described in the second count was constructed jointly by the parties, 3. — : drainage by agreement: subsequent change. under an oral agreement as to its course, etc., each party contributing labor or money to constructing it. The parties have recognized the ditch, have plowed and farmed in accord with it, and have expended money and labor in the performance of the contract. It can be set aside, disregarded and annulled by neither without the consent of the other. The assent of defendant to the construction of the ditch on his land is in the nature of a license which, having been accepted, and the rights conferred assumed and exercised, cannot be set aside or disregarded. *Harkness v. Burton*, 39 Iowa, 101; *Cook v. Railway Co.*, 40 Iowa, 451; *Anderson v. Simpson*, 21 Iowa, 399; *Beatty v. Gregory*, 17 Iowa, 109.

VI. These considerations lead us to the conclusion that the decree of the district court ought to be affirmed as to the second count, and as to the dismissal of defendant's cross-petition, and reversed as to the dismissal of the first count of the petition. A decree ought to have been entered granting the plaintiff all the relief prayed for in his petition, both upon the first and second counts, and dismissing the cross-petition of defendant. The cause will be remanded to the court below for such a decree. MODIFIED AND AFFIRMED, ON DEFENDANT'S APPEAL; REVERSED ON PLAINTIFF'S APPEAL.

THE CITY OF MUSCATINE V. THE CHICAGO, ROCK
ISLAND AND PACIFIC RAILWAY COMPANY.

1. **Statute of Limitations: CONTRACT UNDER ORDINANCE.** Where a city seeks to recover of a railroad company for the breach of a contract arising upon the acceptance of a grant under a city ordinance, the statute of limitations may be interposed as a bar, the same as in cases upon ordinary contracts between natural persons. (See opinion for citations.)
2. ——— : **CONTRACT TO GRADE STREETS WITHIN REASONABLE TIME.** In 1853 plaintiff became bound, under an ordinance making a grant to it, to grade a certain street in a reasonable time. *Held* that an action by the city for a breach of the contract was barred in ten years after the right to it accrued, and that such action, begun in 1886, could not be maintained.
3. **Easement: POSSESSION OF LAND UNDER: WHO PAYS TAXES.** One who has the actual and exclusive possession of land under an easement, with the right to so held it forever, must pay the taxes on the land, and not he who has the empty title. (See opinion for citations.)
4. **Taxation: MISDESCRIPTION: ESTOPPEL.** Water street in the plaintiff city formerly ran along and adjacent to the north bank of the Mississippi river, but by a contract between the city and defendant it was located further north, and the land between the street, as thus located, and the river was granted to defendant, and occupied by it. When a special tax was levied upon such land, described as lying between Water street and the river, *held* that defendant could not be heard to say that the description was an impossible one, and the levy therefore invalid, on the ground that there was no land between Water street and the river.
5. **Taxes for Paving Streets: COLLECTION BY ACTION.** The ordinances of the city of Muscatine provide that the expense of paving the streets may be assessed upon the abutting lots, "which shall have the effect of a special tax thereon, and they may be sold therefor as for a tax;" also that, if the assessments be not paid by the person or persons chargeable therewith, they shall be levied as a special tax upon the property liable therefor; "and all the provisions of law relating to special assessments, and for the enforcement and collection of the same, shall apply to the assessments levied under the provisions of this ordinance." *Held* that, while the property affected by the assessments became bound by a lien, the city could collect the taxes by personal action against the owners. (Compare *City of Dubuque v. Railway Co.*, 39 Iowa, 58.)

79	645
88	293

79	645
109	392

79	645
88	291
112	307
112	309
112	316

79	645
119	148

The City of Muscatine v. The Chicago, R. I. & P. Ry. Co.

Appeal from Muscatine District Court.—HON. C. M. WATERMAN, Judge.

FILED, FEBRUARY 12, 1890.

ACTION at law to recover for grading and macadamizing a street of the plaintiff city, upon which lots alleged to be owned by the defendant abut. The cause was tried without a jury, and judgment rendered for defendant. Plaintiff appeals.

Richman & Burke, for appellant.

J. Carskaddan, for appellee.

BECK, J.—I. The petition in the first count alleges that in 1853 the plaintiff granted to the Mississippi and Missouri Railroad Company, the predecessor of defendant, certain rights, privileges and property, within the corporate limits of the city, pertaining to the right of way for its tracks, and to certain land whereon stations, depots and warehouses, turn-tables and switches, and the like, should be erected, on condition that certain land and streets specified should be used and occupied for the purposes named; and the further condition that if parts of certain lots should be procured, and a strip thereof one hundred feet wide should be dedicated to the use of the public as a part of Water street, in the city, the defendant should grade the new street to the grade of Water street, as the city might direct.

The petition describes the land, but it would be impossible to convey a correct idea of the locality without copying the plats, and entering into a long description. It is sufficient to say that the right of way granted was upon Water street, which runs along the river. It deflected towards the river, and returned, making a kind of an elbow, in which the abutting lots were longer than other lots on the same street,—the longest one hundred and thirty-two feet longer than the others. The lots to be obtained were in this elbow, and the

The City of Muscatine v. The Chicago, R. I. & P. Ry. Co.

street to be dedicated crossed them in a right line with the streets above and below the elbow. The railroad company was to hold and occupy the land between the new street and the river, but was not to occupy the new street, which was to be one hundred feet wide. It clearly appears that the purpose was to change the street from the course around the elbow, so as to run across it, and to provide for the occupancy by the railroad company of all the land between the new street and the river, leaving the new street free from the obstacles of the railroad. The railroad was to have the right to use the earth and stone excavated in making the grade, but was to erect no structure within the new street when the change was made. An ordinance was passed by the city council making the grant to the railroad company upon the conditions indicated, which was finally accepted by the railroad company. It may be appropriately observed here that, in the view we take of the case, we find it unnecessary to inquire whether defendant, the successor of the Mississippi and Missouri Railway Company by purchase at foreclosure sale, is bound by the contract witnessed by the ordinances, or whether, indeed, the ordinance raises a contract between the railroad company and the city. The petition alleges that defendant, having been notified to bring the grade of the new street to the grade of Water street, failed to do so, and the work was then done by plaintiff, and the cost thereof is sought to be recovered upon the first count of the petition.

II. The plaintiff alleges in the second count that, under its charter and ordinance, it is empowered to cause its streets to be paved, and the cost thereof assessed as a special tax against the owners of abutting lots; that, in pursuance of the statutes and ordinances conferring this power, plaintiff proceeded to cause the paving to be done, and demanded payment therefor of defendant, and, after the same was refused, to assess the cost thereof as a special tax on the lots and land of defendant abutting upon the street which was paved. Recovery is sought upon this assessment, under the

The City of Muscatine v. The Chicago, R. I. & P. Ry. Co.

second count of the petition. The provision of the charter and ordinance of plaintiff, and the proceedings of its council pertaining to the city's authority, and the exercise thereof in this case, are made parts of the petition, by attaching copies thereof as exhibits, or by proper reference to the books containing them. The defendant denies that it is the successor of the Mississippi and Missouri Railroad Company, and pleads other defenses, which need not be here more particularly referred to in view of the conclusions we reach as to the law applicable to the case. As a defense to the cause of action set up in the first count, defendant pleads that it is barred by the statute of limitations. The consideration of this defense first demands our attention.

Plaintiff's claim upon the first count of the petition, as we understand its position, is based upon the obligations incurred by defendant, as the successor of the Mississippi and Missouri Railroad Company, which became bound by a contract arising upon its acceptance of the grant made by the ordinance, conferring the right and authority upon it to occupy and use the street for railroad purposes. It is not claimed that plaintiff required defendant to do the grading in the exercise of municipal authority, independent of contract. Recovery is sought in the case upon the contract arising under the ordinance of the city upon the acceptance of the terms and conditions by the grantee, the Mississippi and Missouri Railway Company. We need not, therefore, enter into the inquiry whether a contract arose upon the acceptance of the grant made by the ordinance. We understand neither party denies that the ordinance and its acceptance is in fact the expression of a contract. But counsel for plaintiff say that, while the ordinance is a contract, it is something more; it is a law. This may be admitted. But plaintiff seeks in this action to recover damages resulting from the violation of the contract, not to enforce penalty for the violation of a law. We think it cannot be doubted that the action is brought upon a contract,

1. STATUTE of
limitations:
contract un-
der ordinance

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and that the rules of the law applicable to actions upon contracts are to be followed in this case. As the city upon this action is attempting to recover upon a contract, the statute of limitations may be interposed as a bar as in cases between natural persons. *City of Burlington v. Railway Co.*, 41 Iowa, 134; *City of Pella v. Scholte*, 24 Iowa, 283.

The ordinance was adopted in 1853, and was accepted a few days after it was adopted, of which the city was notified in less than thirty days.

2. — : contract
to grade
streets within
reasonable
time.

The defendant, under the ordinance, became bound to do the grading of the street within a reasonable time. In 1856 and 1857 the railroad company proceeded to do grading upon the street, which is now claimed to have been done to the acceptance of plaintiff, and is a performance of the contract. The evidence shows that grading was done by the railroad company at that time under the contract as expressed in the ordinance. As we have seen, the railroad company was bound to do the work in a reasonable time. A street was established upon which the work could have been done. Surely, we cannot say twenty years should be extended to defendant as a reasonable time in which to do the work. This action was begun in 1886. The period of limitation is ten years. The city could have brought an action prior to 1876. Up to that date defendants had more than twenty years in which to do the grading, and plaintiff, during all of that long period, could have maintained an action against defendant upon the contract. Having failed to institute it within ten years from the time it accrued, its prosecution is barred by the statute.

IV. Under the ordinance of the city and proceeding instituted by defendant, as well as by purchase of a large portion of the property assessed, it acquired the right to hold and occupy it. This right was based upon the acquisition of the title to a large portion of the property, and to an easement upon the other portion. Defendant occupied the land by its railroad track, by

3. EASEMENT:
possession of
land under:
who pays
taxes.

The City of Muscatine v. The Chicago, R. I. & P. Ry. Co.

station-houses, turn-tables and other improvements. A large portion so occupied was never in the street. A part of it was formerly occupied by the old Water street, but the public ceased to occupy it, and the right of occupancy was conferred on defendant. Defendant, as the holder of the easement on the land, as well as the holder of the title thereto, acquired a right to the perpetual possession of the land in question. If any one held the title to the land upon which defendant acquired the easement, it was valueless; for defendant had the right of the perpetual possession and enjoyment of the land. It would be absurd to say that the owner of such title is subject to taxation of any character upon the land, and that the owner of the perpetual possession (the defendant) is not. The spirit of our laws will not permit such a thing. The defendant, the perpetual possessor of the land, is the owner who must respond to all demands made in exercise of the authority of taxation. We think this position demands no further discussion in its support. *Burlington & M. R. Ry. Co. v. Spearman*, 12 Iowa, 112; *Cummins v. Railway Co.*, 63 Iowa, 398; *Hollingsworth v. Railway Co.*, 63 Iowa, 443. As the defendant in this case was in the occupancy of the land with right of perpetual possession, it is to be regarded as the owner, and liable for the taxes thereof.

V. Counsel for defendant insist that the assessment of the special tax does not bind the lots, for the reason that they are not described therein. They are described as lying south of Front street, "between the south line of Water street and the Mississippi river." Counsel insist that the south line of Water street is the Mississippi river, and, therefore, the description is impossible. This position of fact would be correct did the street exist as before the action on the part of plaintiff and defendant; the first, in granting to the last old Water street at that locality, and changing the course of the street as above shown; and the defendant, in taking possession of the

4. TAXATION:
misdescription:
estoppel.

The City of Muscatine v. The Chicago, R. I. & P. Ry. Co.

land south of the new Water street, and using it for railroad purposes. Surely, it cannot deny that Water street is north of its land, which is bounded by it in that direction. Defendant, in acquiring the land and accepting the grant of the city, and in its possession of the property, recognized the fact that Water street should be the northern boundary of its land. We must, therefore, regard the description as sufficient to bind the defendant.

VI. Counsel for defendant maintain that plaintiff is not authorized by the law to maintain an action to

recover the special tax assessed in this case, which is only a lien on the lots, and creates no liability of defendant. This position is

based upon the provision of the city's charter authorizing assessments for paving streets, which is in the following language: "(14) To cause the streets and alleys of the city to be paved, and the pavements to be repaired; and to that end it may require the owners of lots adjacent to which it is to be done to pave or repair one-half in width of the street contiguous to their respective lots; and in case of neglect, after a reasonable time named in the order, the same may be done by the city, and the expense may be assessed on such lots, which shall have the effect of a tax thereon, and they may be sold therefor as for a tax, subject to the same right of redemption."

It is insisted that this provision authorizes an assessment upon the lot, and that the tax assessed is a lien thereon, but no remedy is contemplated against the lot-owner. But the provision expressly declares that the assessment shall have the effect of a tax. The ordinance of the city enacted pursuant to this provision of the charter provides for the collection of the special paving tax in this language: "Sec. 9. Any and all paving done by the city under the provisions of this ordinance shall, if the assessment therefor be not paid by the party or parties chargeable therewith, as herein required, become and be levied as a special tax on the

5. TAXES for
paving
streets: col-
lection by
action.

The City of Muscatine v. The Chicago, R. I. & P. Ry. Co.

property liable for such assessments; and all the provisions of law relating to special assessments, and for the enforcement and collection of the same, shall apply to the assessments levied under the provisions of this ordinance." It will be observed that the assessments, having the effect of a tax under the provision of the charter, may, under the ordinance, be enforced, if collected by virtue of the provisions of the law applicable to special taxes. The assessment in question is a tax. The tax is a debt, for the recovery whereof an action may be maintained. *City of Dubuque v. Railway Co.*, 39 Iowa, 58. As we understand the abstract upon which the case is submitted, while the assessment and levy was upon the land, the taxation was against defendant as the owner of the property; that is, defendant was assessed and taxed as the owner of the property. It is the usual case of the assessment and levy of taxes upon a tax list showing the owner of the property, its description, the amount of taxes, etc. The property becomes bound by a lien for the taxes for which the owner is liable. It is not the case of an assessment upon the property, so that it is *in rem* only, and not against the owner.

VII. The character of the pavement, its width, thickness, etc., the notices and other things required in the proceedings, were matters for determination by the city council. There is nothing in the record showing the invalidity of the proceedings for taxation by reason of the fact that the work was improperly done, or the proceedings were irregular. It is too late to urge objection founded upon such matters after the work is completed and the assessment made, and rights acquired which are based thereon. We conclude that the plaintiff is entitled to recover upon the second count of the petition. In our opinion, the foregoing discussion disposes of all questions demanding consideration in order to lead us to a decision of the case. The cause will be remanded for a new trial.

REVERSED.

THE TAMA WATER-POWER COMPANY V. HOPKINS.

79	653
85	208
79	653
96	150
79	653
143	16

1. **Corporations: SUBSCRIBERS TO STOCK: LIABILITY TO CREDITORS: ESTOPPEL.** Defendant was a subscriber to the stock of a corporation of which plaintiff afterwards became a creditor. The capital stock of the corporation was fixed at twenty thousand dollars, all of which was required to be subscribed before it could begin business. Defendant first subscribed for twenty-five hundred dollars' stock, and afterwards for twenty-five hundred dollars' preferred stock, but it appears that the condition making the second subscription one for preferred stock was erased without defendant's authority. But defendant was one of the organizers and promoters of the corporation, and was always one of its directors, and he knew that the articles of incorporation made no provision for preferred stock, and also that both of his subscriptions were required to make the twenty thousand dollars necessary for the beginning of business. *Held* that, whatever the effect of his second subscription, with the condition erased, might be as between him and the corporation, he was estopped from denying liability thereon as to a creditor of the corporation seeking assets out of which to make its demand.
2. ———: ———: ———: **SET-OFF.** A stockholder in a corporation, who is indebted for stock, cannot, as against a judgment creditor of the corporation who seeks to subject the amount due from the stockholder to the satisfaction of his judgment, set off against such amount a debt owing by the company to him. (*Boulton Carbon Co. v. Mills*, 78 Iowa, 460, *followed*.)
3. ———: ———: ———: **STATUTE OF LIMITATIONS.** Where it is sought to make a stockholder liable to a judgment creditor of a corporation to the extent of the balance due on stock subscribed for by the former, he cannot plead the statute of limitations as to so much of the indebtedness on which the judgment was rendered as accrued more than five years prior to the beginning of the suit against him, where the judgment was rendered on a note given in settlement of said indebtedness before it was barred by the statute.
4. ———: ———: ———: ———: **ABSENCE FROM STATE.** In such case, where the subscription was in writing and it was collectible more than ten years prior to the suit brought by the creditor against the stockholder, but he was not a resident of the state for ten years of that time, the action against him was not barred.
5. ———: ———: ———: **DISSOLUTION OF CORPORATION: REMEDY.** In such case, though the corporation had ceased to exist, the remedy by the creditor against the stockholder was the one prescribed by

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sections 1082-1084 of the Code, and there is no requirement that the action be in equity; and where the proceeding, as one at law, was not objected to in the lower court, the objection cannot be raised here. (Compare *Bayliss v. Swift*, 40 Iowa, 651.)

Appeal from Tama District Court.—HON. S. M. WEAVER, Judge.

FILED, FEBRUARY 13, 1890.

PLAINTIFF is a judgment creditor of the Tama Paper Company, of which defendant is a stockholder. This is an action to recover of defendant the sum of twenty-five hundred dollars, alleged to be due from him to said company on account of stock by him taken. After the evidence was submitted, the court directed the jury to return a verdict in favor of plaintiff for the sum of twenty-five hundred dollars. From the judgment rendered on the verdict, defendant appeals.

Struble & Stiger, for appellant.

W. H. Stivers and *J. W. Willett*, for appellee.

ROBINSON, J.—On or about the twentieth day of June, 1877, the Tama Paper Company was organized as a corporation for pecuniary profit. Its articles of incorporation provided for a capital stock of twenty thousand dollars, divided into shares of one hundred dollars each, to be paid at the call of the board of directors. The company was permitted to commence business when subscription for the twenty thousand dollars of stock had been taken. The private property of the stockholders was to be exempt from the payment of the corporate debt, excepting for amounts due on stock. Defendant was one of the incorporators and original stockholders of the company, and signed the stock subscription paper twice. Opposite his first signature was written, "Twenty-five shares." Opposite his second signature, and following it, was written, "Twenty-five shares of preferred stock, on which the

The Tama Water-Power Co. v. Hopkins.

company guarantees ten per cent. interest, payable annually." Another stockholder made similar subscriptions, and all were required to make the total of twenty thousand dollars. Defendant was elected a director of the company, and was re-elected from time to time, and continued to act as director from the time the company was organized until it went out of business, after the debts in controversy were contracted. During at least a part of that time he also held the position of traveling agent of the company. He paid, on account of his stock subscription, the sum of twenty-five hundred dollars. Defendant admits the recovery of two judgments by plaintiff against the paper company, which amounted to more than twenty-five hundred dollars, when the case was tried in the court below, and that they are unpaid; but relies upon various defenses to this action, which we will proceed to consider.

I. It appears that the second subscription of defendant was altered, after it was made, by striking out the words "preferred" and "on which the company guarantees ten per cent. interest, payable annually." The evidence shows that the alteration was made within five or six months of the date of the subscription, if not at the time; but defendant states that it was made without authority from him, and that he had no knowledge of it until about the time this action was commenced. The books of the company fail to show any authority by the board of directors of the company, or by any one else, for making the erasure. So far as the evidence shows, the change in the subscription was made without authority, and without the knowledge of defendant, and the officers of the company empowered to act for it. Therefore, during the time in question, defendant must have believed himself to be the owner of fifty shares of stock. Appellant claims that he is released from liability in this action by reason of the alteration in the terms of his subscription. In reply to that, plaintiff

1. CORPORATIONS: subscribers to stock: liability to creditors: estoppel.

pleads that defendant is estopped from denying liability, by reason of the acts of the company and his connection with it, and we think the record shows that to be the case. The articles of incorporation which were signed by defendant do not provide for the issuing of preferred stock. The company had no power, under the articles adopted, to commence the business for which it was organized, until the full amount of its capital stock was subscribed. 1 Mor. Priv. Corp., secs. 57, 137, 141, 408. Notwithstanding that fact, on the day the company was organized its board of directors directed the collection of the stock subscriptions at once; a contract for the building of a mill was authorized; and the transaction of the business of the company was actively commenced, and continued for nearly ten years. Defendant knew that both of his subscriptions were necessary to authorize the company to do business, and with that knowledge he was active in the management of its affairs, and one of its managing officers. It is claimed that the evidence does not show that plaintiff knew of and relied upon the second subscription of defendant. But we do not think that was necessary to estop defendant. Plaintiff had a right to believe that the paper company was a legally organized corporation, with a capital stock of twenty thousand dollars, and undoubtedly relied upon that belief in dealing with the paper company. The acts of defendant in becoming a stockholder of that company, and in holding it out to the world as a valid corporation with the capital named, and in helping to manage its business, justified plaintiff, so far as defendant is concerned, in extending credit to the company. Under these circumstances, we do not think defendant should be heard to deny liability. What effect the alteration of defendant's subscription would have as between himself and the company is a question we are not required to determine.

II. Appellant claims that the paper company was indebted to him when this action was commenced in various amounts, aggregating about six thousand dollars, and that he should be

2. —: —:
—: set-off.

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permitted to offset so much of that as is necessary to extinguish his liability, if any, for unpaid stock. The facts in this case bring it within the rule announced in *Boulton Carbon Co. v. Mills*, 78 Iowa, 460. It follows that the claim of appellant is not well founded.

III. The indebtedness upon which the judgments of plaintiff were rendered was incurred for water-power furnished by plaintiff to the paper company. On the first day of January, 1884, there was an accounting for the power furnished prior to that time, and a note given therefor to plaintiff for \$397.73. That note was merged in one of the judgments for which plaintiff claims to recover. This action was commenced June 15, 1888, and appellant contends that, as against him, all of the indebtedness which accrued prior to June 15, 1883, is barred by the statute of limitations. It is not clear that any of the indebtedness in suit was contracted prior to the date last named, but, conceding that it was, that fact would not relieve defendant from liability; for it is not shown that plaintiff could not have collected the amount so contracted of the paper company when the note was given. *Bank v. Greene*, 64 Iowa, 450.

IV. The secretary of the paper company was authorized to collect the amount of the stock subscriptions on the twentieth day of June, 1877. Appellant contends that, as his liability was then fixed, the right to recover therefor is now barred by the statute. The subscription contract was in writing. Defendant was a non-resident of this state from the year 1874 until the latter part of June, in the year 1880. Therefore, plaintiff's right of action is not barred.

V. Appellant claims that the paper company has ceased to exist, and that in consequence the relief sought by plaintiff can be obtained only by proceedings in equity. We do not discover that any objection was made in the court below to the kind of proceedings adopted.

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The liability of defendant, and the method of obtaining relief, are provided for by sections 1082-1084, Code. The facts upon which the liability of a stockholder depends can, as a rule, be as readily ascertained by an action at law as by a proceeding in equity. We think the proper action was adopted. *Bayliss v. Swift*, 40 Iowa, 651.

VI. What we have said disposes of all material questions discussed by counsel. The judgment of the district court is

AFFIRMED.

DUNCAN V. FINN *et al.*

1. **Statute of Limitations: RECOVERY OF MONEY ADVANCED.** An action to recover money advanced upon a verbal contract to pay it out for plaintiff's benefit, which defendant fails to do, is barred in five years after it accrues, in the absence of fraudulent concealment on the part of defendant.
2. **Vendors and Purchasers: MORTGAGED PROPERTY: EXTENSION OF TIME TO PURCHASER: PERSONAL LIABILITY.** Where one purchases mortgaged property, subject to the mortgage, but without assuming to pay the mortgage debt, which is not yet due, and he afterwards negotiates an extension of time on the debt, but expressly stipulates with the holder of the mortgage that he is not thereby to become personally responsible for the debt, he does not become so responsible, though the mortgaged property so depreciates in value as to become insufficient security for the debt.
3. **Negotiable Instruments: INNOCENT PURCHASER.** Where the holder of a note and mortgage has agreed with a purchaser of the mortgaged property for an extension of the time of payment, but no memorandum of such agreement is entered on the original papers, and these are transferred for value after the original date of their falling due, as shown on their face, and without any notice of the extension, the assignee of the paper takes it "after due," in such sense that he acquires no rights which his assignor could not have claimed and enforced.

Appeal from Taylor District Court.—HON. J. W. HARVEY, Judge.

FILED, FEBRUARY 13, 1890.

Duncan v. Finn.

ACTION in equity to recover the amount of certain mortgage bonds. The defendant Dunning filed a cross-petition, in which he demanded relief against his co-defendant, Finn. There was a trial by the court, and a decree rendered in favor of plaintiff against Finn, and in favor of Finn as against Dunning. Both Finn and Dunning appeal.

Lehman & Park and *Cummins & Wright*, for appellant Finn.

Crum & Haddock and *Phillips & Day*, for appellant Dunning, and for appellee Duncan.

ROBINSON, J.—On the first day of February, 1876, Lewis G. Parker executed and delivered to the Mercantile Trust Company of New York his certain bonds, to the amount of fifteen hundred dollars, payable on the first day of February, 1881. To secure the payment of said bonds, Parker executed and delivered a trust deed which conveyed “the west twenty-two feet of lot number six, in block number fourteen, in the original town of Bedford, Iowa.” On the tenth day of February, 1881, the trust company assigned the bonds to Mary W. P. Crane, of Cook county, Illinois, and on the thirtieth day of September, 1884, she assigned them to plaintiff. On the third day of July, 1878, Parker conveyed, by warranty deed, all his interest in said premises to Dunning and two others, and the deed provided that Dunning should assume and pay the aforesaid bonds. On the eighth day of March, 1880, Dunning and his co-grantee conveyed said premises to defendant Finn, by a warranty deed, which provided that it was subject to the deed of trust aforesaid, with interest from February 1, 1880. On or about March 11, 1881, Mary W. P. Crane and defendant Finn entered into an agreement in writing which recited the making of the loan to Parker, and further stated and provided as follows:

Duncan v. Finn.

“And, whereas, the said Lewis G. Parker and Addie M. Parker have conveyed the said mortgaged premises, and the same are now owned by one G. L. Finn, of Bedford, Iowa, who, in purchasing, has taken said real estate subject to the said loan of fifteen hundred dollars, above referred to, and the same being now due, and said Finn being desirous of having the said loan renewed and extended for the period of five years from and after the first day of February, 1881; and, whereas, one Mary W. P. Crane * * * has purchased the said bonds and mortgage from said Mercantile Trust Company, and is now the absolute owner of the same, a full and complete assignment having been made therein to her: Now, therefore, in consideration of the foregoing premises, and other valuable considerations, the said Mary W. P. Crane hereby agrees to extend the time for the payment of the principal sum of said bonds till February first, 1886, upon the payment of the interest, at the rate of seven per cent. per annum, at the times stated and agreed upon in said bonds, and upon the full and complete performance of and compliance with all the conditions named and recited in said bonds and mortgage above mentioned. And it is hereby expressly agreed that, should any of the conditions of said mortgage, but especially those relating to the payment of interest at the times stated, and to the payment of taxes, and the effecting of insurance upon the property, not be promptly complied with, then this agreement for an extension of time shall be void, and the principal sum named and expressed in said bonds, as well as all the due and overdue interest which may have accrued thereon, shall become due and payable at once, at the election of the said Mary W. P. Crane, and the said Mary W. P. Crane may use any and all the remedies upon the said bonds and mortgage as, by the terms of said instrument, her assignor, the said Mercantile Trust Company, could have used, in like case of forfeiture, while the said Mercantile Trust Company was owner of the same. The intention being to continue this loan for the term of five years, at the rate of

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seven per cent. per annum, upon the compliance with the terms of the bonds and mortgage above mentioned; and any condition in said mortgage and bonds as to said debt drawing interest at the rate of ten per cent. after the maturity of the note is expressly waived by said Mary W. P. Crane, and in that regard said bonds are treated as if they never had matured, but had been made for the term of ten years, instead of five. And, in case the bonds are due by reason of the non-compliance with the terms thereof as to the payment of interest, taxes, insurance, etc., the said Mary W. P. Crane may do and have the same remedies as the said Mercantile Trust Company could have done under like circumstances. It is further agreed that in future the interest that falls due on this loan may be paid by said Finn at number 108 Dearborn street, in the city of Chicago. Dated this eighth day of March, 1881.

“MARY W. P. CRANE,

“By RICKEL & EASTMAN, Agents and Attorneys.”

“In consideration of the premises above named, I hereby accept the above conditions upon which said extension is granted, and I agree to carry out and execute the provisions of this agreement; and, should I fail or neglect so to do in any respect, I hereby authorize the holder of these bonds and said mortgage to proceed, according to the terms and conditions named, to foreclose and collect the same. Witness my hand at Bedford, Iowa, this eleventh day of March, 1881.

“G. L. FINN.”

The transaction between Finn and Dunning was in part an exchange of real estate. Finn owned the property in which Dunning now has a bank, which was valued at five thousand dollars, and he proposed to exchange it for that in controversy, which was valued at four thousand dollars, and for one thousand dollars in addition. It was finally agreed that he should receive for his property that in controversy, subject to the mortgage thereon for fifteen hundred dollars, and in addition the sum of twenty-five hundred dollars; and

Duncan v. Finn.

the exchange was made, and the money paid, according to that agreement. Dunning claims that, when the trade was made, Finn verbally agreed that if the money secured by the mortgage was paid to him, instead of being used to satisfy the mortgage, he would pay the mortgage when it became due, and that the money was paid to him under that agreement. Dunning asks that the property of Finn be first subjected to the payment of the mortgage debt, and demands judgment against him for the amount he paid him on account of the mortgage, with interest. The plaintiff claims that Finn is liable for the full amount of the mortgage debt, by reason of his alleged agreement with Dunning and his agreement with Mary W. P. Crane. Finn denies the alleged agreement with Dunning, and insists that it was expressly agreed at that time, and when he made the Crane agreement, that he should not be personally liable for any part of the mortgage debt. It appears that, before the decree from which this appeal is taken was rendered, a decree of foreclosure had been rendered, and the premises in controversy sold on the twenty-first of May, 1888, for eight hundred dollars. The district court found that Finn, by his contract of renewal, had become personally liable for the loan in question, and rendered judgment against him for the amount thereof, and of certain taxes paid by plaintiff, deducting therefrom the amount realized from the sheriff's sale of the premises. The cross-petition of Dunning against Finn was dismissed.

I. Appellant Dunning seeks to recover of Finn the sum of \$1,514.32, with interest thereon from March 20, 1880, on the ground that it was paid by him to Finn, at that time, under a verbal agreement that it was to be used in satisfying the mortgage in controversy; that Finn failed to use it for that purpose, and fraudulently concealed that fact from Dunning, who, it is alleged, had no knowledge of Finn's failure to make the payment until foreclosure proceedings were begun in this action. Finn denies these claims, and pleads that Dunning's

1. STATUTE of
limitations:
recovery of
money ad-
vanced.

Duncan v. Finn.

alleged right of action is barred by the statute of limitations. We think that plea is sustained by the evidence, so far as it relates to Dunning's alleged right to recover of Finn. More than five years elapsed after the alleged right of action accrued before this action was commenced, and no fraudulent concealment on the part of Finn is shown. Other objections to Dunning's right of recovery need not be noticed.

II. Plaintiff, to sustain his alleged cause of action against Finn, relies in part upon the transaction between Finn and Dunning, and in part upon the Crane agreement for an extension of time of payment. The original agreement between Finn and Dunning was that the mortgage in question should be satisfied before the exchange was made, and that Finn should receive the mortgaged property, and one thousand dollars in addition, for his property. The mortgage debt was not then due, and its owner would not accept payment unless the sum of thirty dollars was paid as an inducement, besides the amount then due. For that or some other reason the original agreement was modified, and Finn was paid the one thousand dollars first contemplated, and also the amount of the mortgage at the date of the exchange of deeds, and the mortgaged property, for his property. Dunning testifies that at that time the question of the mortgage came up, and Finn asked him to pay the money; that he said "he could use it to good advantage, as it only drew seven per cent. interest; and that he would pay the mortgage when it became due,—he could make more than that out of the money;" and that the money was paid under that agreement. Finn explicitly denies that such an agreement was made, and says that he expressly refused to become personally responsible for the debt, and stated, as one of his reasons, that he wished to dispose of the property, and the insurance might not be kept up; that the deed represented the final agreement between the parties. Finn is to some extent corroborated by the deed, which recites that it is subject to the mortgage, but does not make the grantee responsible for it. Since the burden of proving

Duncan v. Finn.

the agreement in question is upon plaintiff, he has failed as to that, for the preponderance of the evidence is against him. His case is not strengthened by the fact that Dunning, as a prudent business man, should have made the agreement which he now testifies he did make, for the reason that, as a careful and competent man of business, he would have had it reduced to writing, since a part of the agreement was written; and for the further reason that it clearly appears that both parties to the agreement, at the time it was made, believed the mortgaged property to be ample security for the debt. It may be true, as claimed by Finn, that Dunning incurred the risk of the payment of the debt, rather than to pay thirty dollars to have it satisfied. In any event, the claim of Finn that, in the exchange of the property, his was estimated to be worth five thousand dollars, while Dunning's, subject to the mortgage, was worth but twenty-five hundred dollars, and that the twenty-five hundred dollars paid him was for the difference in value, is as well sustained by the evidence as is the claim of Dunning. Therefore, plaintiff must fail as to that issue.

III. The Crane agreement for an extension, coupled with the transaction with Dunning, presents a more difficult question. Conceding that Finn had not been previously liable for the debt, did he not become so by the Crane agreement? His contract with Dunning did not contemplate nor provide for an extension of time for the payment of the debt. Such an extension was in fact obtained, and interest was paid on the debt by Finn for years, until, we may presume from the record, for some undisclosed reason, the mortgaged property ceased to be sufficient security for the debt. There is much force in the claim of appellee that by reason of these facts, and the provisions of the Crane agreement, Finn made the debt his own. However, it is shown, without conflict in the evidence, that the firm of Rickel & Eastman acted as the agents of Mary W. P. Crane in making the contract of extension; that there was much correspondence between that firm and Finn before the agreement

2. VENDORS and
purchasers:
mortgaged
property:
extension of
time to pur-
chaser: per-
sonal liability.

Duncan v. Finn.

was completed in regard to the personal liability of the latter; that in that correspondence he at all times refused to assume personal liability; that he paid seventy-five dollars to procure the extension, but before it was paid, and after the agreement was signed, he refused to pay it unless assured that he was not to be held personally liable for the debt; and that he received such an assurance in writing from Rickel & Eastman, and thereafter paid the seventy-five dollars. If there is any conflict between the agreement and the writing just referred to, the latter must control. What effect this transaction should have had upon Dunning's liability is a question not presented for our decision, but it certainly had the effect to relieve Finn from obligation to Mary W. P. Crane.

It is said that the correspondence with Rickel & Eastman ought not to be considered, because plaintiff is

8. **NEGOTIABLE**
instruments :
innocent pur-
chaser.

an innocent purchaser of the bonds in suit. That claim is not supported by the record. The bonds were purchased by plaintiff after they appeared to be due. He claims under a written assignment which purports to sell and transfer all the right, title and interest of Mary W. P. Crane in the bonds in suit, and the mortgage or deed of trust given to secure them. It does refer to Finn, and makes no mention of an extension of the time of payment, but provides that the assignee shall have and enjoy all the rights and privileges given and secured by the bonds as fully as the assignor could have done had the assignment not been made. It does not appear that any representations were made to plaintiff besides those contained in the instruments purchased and the assignment, to induce him to make the purchase. We conclude that plaintiff acquired no right, by virtue of the assignment, which his assignor could not have claimed and enforced. It follows, from what we have said, that the decree of the district court on appeal of Dunning must be affirmed, and that on the appeal of Finn it must be

REVERSED.

79	666
107	428
107	430
79	666
121	408
121	404

TAYLOR COUNTY V. STANDLEY.

1. **Counties: ACTIONS BY: COUNTY ATTORNEY.** An action by a county to recover money due it will not be dismissed on the ground that counsel other than the county attorney prosecutes it under the direction and employment of the board of supervisors; for the board has the right, by virtue of its general powers to manage the affairs of the county, to employ counsel, and to cause proceedings to be instituted in the name of the county without the consent of the county attorney, and regardless of his willingness or ability to appear for the county. (See opinion for statutes considered and cases cited.)
2. **Pleading: TWO COUNTS: ELECTION.** Although the two counts of the petition were, in legal effect, much the same, and no good reason is apparent for both, yet, as no prejudice could have resulted to defendant from the overruling of his motion to compel plaintiff to elect on which he would stand, and to strike out the other, *held* that such ruling was no ground for reversing a judgment for plaintiff.
8. **Counties: RECOVERY OF MONEY OBTAINED THROUGH TREASURER: REMEDY.** Where defendant, by conspiracy with the treasurer of plaintiff, came into possession of plaintiff's money, and refused to pay it to plaintiff, an action was properly begun and maintained against him therefor. Plaintiff was not confined to its remedy on the treasurer's bond.
4. ———: ———: **CONSPIRACY: EVIDENCE.** Where in such action the evidence tended to show that the transactions between the treasurer and defendant, involving the money of plaintiff, began when the former entered upon the duties of his office, and were continued until his last settlement with the plaintiff's supervisors, *held* that evidence of statements made officially by the treasurer, as a part of his semi-annual settlements with the supervisors, was properly admitted as tending to show the amount of money for which the treasurer was liable at different times, and, when considered with other evidence, the dealings between him and defendant under the alleged conspiracy between them.
5. **Conspiracy: EVIDENCE: DECLARATIONS OF CO-CONSPIRATOR: INSTRUCTION.** In an action against defendant to recover money alleged to have been obtained by him through a conspiracy with one K., the court instructed: "If you find from the evidence * * * that the defendant and K. were engaged in a conspiracy * * * then the declarations and statements made by K., and admitted in evidence, may be taken into consideration by you,

Taylor County v. Standley.

in connection with all the other facts and circumstances proved on the trial." *Held* erroneous, because it did not limit the jury to such declarations only as were made by the alleged co-conspirator while the conspiracy was in progress, and in furtherance of its objects. And, since the only evidence as to the amount of money which defendant had thus obtained was the declarations of K., which the evidence tended to show were made when the conspiracy was at an end, and not in furtherance thereof, the error was prejudicial, and ground for reversal. (See opinion for citations.)

Appeal from Union District Court.—HON. R. C. HENRY, Judge

FILED, FEBRUARY 13, 1890.

ACTION to recover for money alleged to have belonged to plaintiff, and to have been wrongfully obtained by defendant, and converted to his own use. There was a trial by jury, and a verdict and judgment for plaintiff. The defendant appeals.

L. T. McCoun, for appellant.

J. P. Flick, G. B. Haddock and Mark Atkinson, for appellee.

ROBINSON, J.—The petition contains two counts. The first alleges that one P. C. King was treasurer of Taylor county from January, 1878, until some time in August, 1884; that during that time large sums of money, for which he was required by law to care and account to plaintiff, came into his hands; that defendant, knowing that King was treasurer, and as such held said money in trust for plaintiff, with intent to cheat, wrong and defraud plaintiff, conspired with King to divert said money from its legitimate use, and to fraudulently convert it to the use of defendant; that about the year 1884 the defendant, by virtue of said conspiracy, took from King \$27,516.16, knowing when he received it that it belonged to plaintiff; that it was fraudulently taken by defendant, and by such wrongful

Taylor County v. Standley.

taking and conversion King became a defaulter, and plaintiff lost the money; that it has never been replaced. The second count alleges that King was treasurer, as stated in the first count; that, during the time he was such treasurer, defendant fraudulently procured from King, and converted to his own use, money which was the property of plaintiff; that, at the January and June settlements of each year during that time, defendant furnished, and procured to be furnished, to King money to be counted by the board of supervisors in such settlements; that, after such settlements were had and completed, the defendant, knowing that such money had been received and counted by said board as county funds, and credited to King, again took the money so furnished and counted, and converted it to his own use; that defendant has fraudulently procured, through collusion with said treasurer, and converted to his own use, of money belonging to plaintiff, the sum of \$27,516.16, and refuses to account to plaintiff therefor. Each count contains a demand for judgment for the sum named. The answer upon which the action was submitted to the jury was a general denial. The amount of plaintiff's recovery, fixed by the verdict, was eighteen thousand dollars principal and forty-three hundred and eighty dollars interest. The judgment rendered was for that amount.

I. The petition was signed by G. B. Haddock and J. P. Flick, as attorneys for plaintiff. It is made to appear that neither of them was the county attorney of Taylor county, and that the county attorney was available, and had not refused to bring this action. It is also shown that Mr. Flick was employed by the board of supervisors of Taylor county to bring such action as he might deem advisable to recover money belonging to that county. Before answering, defendant filed a motion to dismiss the action, on the alleged grounds that the action was not brought nor authorized by the county attorney; that there is no petition signed by the county attorney

1. COUNTIES:
actions by:
county attorney.

Taylor County v. Standley.

on file; and that the petition on file was not signed by anyone authorized to do so. The county attorney had entered an appearance for plaintiff, and filed a consent to the appearance of the attorneys named, before the motion to dismiss was filed. The motion was overruled, and the correctness of that ruling is presented for our determination.

Section 205 of the Code, prior to its repeal in the year 1886, provided that the district attorney should appear, for the several counties in his district, in all matters in which such counties might be parties, or interested; but it also provided that nothing therein contained should prevent the board of supervisors from employing other counsel, in any case properly belonging to the duties of the district attorney, when they deemed it necessary. While that section was in force it was held by this court that the board of supervisors might employ counsel whenever they deemed it expedient to prosecute or defend an action to which the county was a party. *Tatlock v. Louisa County*, 46 Iowa, 138; *Jordan v. Osceola County*, 59 Iowa, 389.

But it is said that chapter 73, Acts Twenty-first General Assembly, has so far changed the law as to require the appearance of the county attorney in all actions to which his county is a party. It is true that it makes it his duty to so appear, but in terms substantially like those used in section 205 of the Code, which it repealed. Attention is called to the last provision of section 4 of that chapter, which is as follows: "But nothing in this section shall be construed to prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested." There is nothing in that provision, however, which can be construed to take away the power of the board of supervisors, which had theretofore existed, to employ counsel for the county. There is nothing in chapter 73 which would prevent the bringing of an action in the name of the county unless the county attorney appeared

Taylor County v. Standley.

therein. The provision of section 5, in regard to the appointment of an attorney to act in case of the absence, sickness or disability of the county attorney and his deputies, was designed to prevent delays, and secure justice, in the prosecution of proceedings in court. We are of the opinion that the board of supervisors was authorized to employ counsel on behalf of the county by virtue of the general powers given them by statute to manage the affairs of the county, and that their right to do so, and to cause proceedings to be instituted in the name of the county, in cases of this kind, does not depend upon the consent of the county attorney, nor upon his willingness or ability to appear for the county. The motion to dismiss was properly overruled.

II. Appellant asked the court below to require plaintiff to elect the count of the petition upon which it would proceed, and to strike the other from the petition, but was denied. The counts were, in legal effect, much the same, and we fail to discover any good reason for both; but we do not think any prejudice could have resulted from permitting both to remain.

2. PLEADING:
two counts:
election.

III. Defendant filed an amendment to his answer, which alleged, in substance, as an additional defense, that plaintiff had no right to bring this suit, for the reason that its only remedy for the wrong complained of was on the bond of its late treasurer, King. A demurrer to the amendment was sustained, and of that ruling appellant complains. We think it was correct. The remedy upon the bond of the defaulting officer was not exclusive. It is shown in this case that judgment has been rendered against King, on account of the deficit in controversy, for more than thirty thousand dollars, and against his bondsmen for less than half that amount. There is no reason why the county should not be permitted to pursue its property in the hands of any one who has it wrongfully, or recover its value from any one who has wrongfully converted it to

3. COUNTIES: re-
covery of
money ob-
tained
through
treasurer:
remedy.

Taylor County v. Standley.

his own use, in the same manner and to the same extent as it could if it were a private individual.

IV. Statements made by King on the occasions of his semi-annual settlements with the board of supervisors were introduced in evidence against the objections of defendant. They were made by King officially, as a part of the settlements which the law required to be made. Code, sec. 913. They were competent evidence as tending to show the amount of money for which King was liable at different times, and as tending to show, when considered with other evidence, the dealings between King and defendant which are claimed to have been carried on under the alleged conspiracy. It is true that some of the statements in question were made prior to the last satisfactory settlement had by King with the board of supervisors. But a conspiracy may be established by showing facts and circumstances which are sufficient to show that one existed. An express agreement need not be proven. *Miller v. Dayton*, 57 Iowa, 428; 4 Amer. & Eng. Cyclop. Law, 629. The evidence tended to show that the transaction between defendant and King involving money of plaintiff commenced when the latter entered upon the discharge of his duties as treasurer, and were continued until after the last settlement was made. Therefore, evidence which was of a nature to explain any part of these continuous transactions was proper for the jury to consider, to aid them in ascertaining their true character.

V. The thirteenth paragraph of the charge to the jury is as follows: "If you find from the evidence, and all the facts and circumstances introduced in proof before you, that the defendant and P. C. King were engaged in a conspiracy, as defined in the foregoing instructions, then the declarations and statements made by P. C. King and admitted in evidence, may be taken into consideration by you, in connection with all the other facts and circumstances proved on the trial. But, if you

4. —: —:
conspiracy:
evidence.

5. CONSPIRACY:
evidence:
declarations
of co-conspir-
ator: instruc-
tion.

Taylor County v. Standley.

find that there was no such conspiracy, then such declarations and statements will not be considered by you." It is well settled that the acts and declarations of one of several conspirators in pursuance of the original concerted plan, and with reference to the common object, are, in contemplation of law, the acts and declarations of them all, and may be shown in evidence against each of them. *Miller v. Dayton*, 57 Iowa, 428; 1 Greenl. Ev., sec. 111; 1 Phil. Ev. *205; 4 Amer. & Eng. Cyclop. Law, 631. Where the declarations "are not acts in themselves nor part of the *res gestæ*, but a mere relation or narrative of some part of the transaction, or as to the share which other persons have had in the execution of a common design," they are not within the rule stated. 1 Phil. Ev. *208. Declarations made after the common enterprise is at an end, whether by accomplishment or abandonment, or which are not in furtherance of its object, are not within the rule, and will be excluded excepting as against the one who made them. *Johnson v. Miller*, 63 Iowa, 533; *State v. Weaver*, 57 Iowa, 732; *State v. Westfall*, 49 Iowa, 332; *State v. Arnold*, 48 Iowa, 566; 1 Greenl. Ev., sec. 111; 4 Amer. & Eng. Cyclop. Law, 632. The paragraph of the charge quoted was erroneous. It instructed the jury, in effect, that if a conspiracy was proven then they might consider all declarations and statements made by King, and shown by the evidence as proof against defendant. The jury were not told to consider only such declarations and statements as were made while the conspiracy was being carried on and to aid in accomplishing its object. The effect of the instruction may have been prejudicial. Two witnesses testified that King had stated in their hearing, and in the absence of defendant, about the month of June, 1884, and at or after the time when King was attempting to make a settlement with the board of supervisors, and when it was known that there was a deficit, in substance and effect, that defendant had eighteen thousand dollars of the money which

Taylor County v. Standley.

belonged to the county, and, if he could get a settlement with defendant, he could make good the amount he owed the county. The evidence of King was offered by plaintiff in the form of a deposition. In it he stated that he deposited some of the county funds with the defendant, and that the amount was probably as much as five thousand dollars; also, that the amount of county funds deposited by him in the names of persons other than himself would vary from ten thousand to twenty thousand dollars. There was some evidence to the effect that King let other persons than defendant have county money. The only evidence which we have noticed, or to which our attention has been called, which would tend to fix the amount of money belonging to plaintiff which defendant had received as that named in the verdict, were the declarations of King already mentioned. Therefore, we are satisfied that the jury gave weight to them in agreeing upon their verdict. It is said that the jury necessarily found that a conspiracy had existed between defendant and King; hence, that the error in the instruction could not have been prejudicial. But the instruction, in effect, assumed that, if there was a conspiracy, all the declarations shown by the evidence were made while it was in progress. That was a matter for the jury to determine. It is claimed by appellant, with some apparent support in the record, that, if a conspiracy ever existed, it was at an end before the declarations of King to the two witnesses, to which we have referred, were made. The instruction, further, erroneously assumes, in effect, that all the declarations and statements shown were made in furtherance of the objects of the alleged conspiracy. Whether they were or not would, in most cases, be a question for the jury; but the statements made by King as to the amount of money defendant had were evidently not made to promote the object of the conspiracy alleged in the petition, and should have been excluded.

VI. Numerous other questions are presented by counsel for appellant,—among them some based on rulings in regard to the introduction of evidence. Some of the rulings were, we think, erroneous; especially those which permitted plaintiff to show transfers of property made long after the transactions in controversy were had. We do not think that evidence tended to sustain or defeat any issue in the case. Most of the questions presented, and not specially mentioned by us, are not of a character to be likely to arise on another trial. Other questions are determined by what we have already said, and need not be further considered.

For the errors stated the judgment of the district court is
REVERSED.

THE STATE V. HALL.

1. **Appeal: RECORD ONLY CONSIDERED.** Certain alleged remarks of a judge, of which defendant complains, cannot be considered by this court, since they are not made a part of the record by bill of exceptions. The affidavit of defendant's counsel, attached to his motion for a new trial, cannot be considered. (See *Rayburn v. Railway Co.*, 74 Iowa, 637.)
2. **Larceny from the Person: EVIDENCE: IDENTIFICATION: LEADING QUESTION.** The money having been stolen from the person of the prosecuting witness as alleged, *held* that the evidence (see opinion) was sufficient to identify defendant as the thief; and that, after the prosecuting witness had positively identified him as the criminal, it was not prejudicial error for counsel to point him out and ask the witness whether or not he was the man who committed the crime.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

FILED, FEBRUARY 14, 1890.

THE defendant was indicted, tried and convicted of the crime of larceny from the person, and he appeals.

McHenry, McHenry & McHenry, for appellant.

John Y. Stone, Attorney General, for the State.

ROTHROCK, C. J.—I. It is urged by counsel for appellant that the motion for a new trial should have been sustained, upon the ground that, before the cause was called for trial, a judge of the district court, other than the one who presided at the trial, used certain language, while presiding as judge, in which a verdict of not guilty in another case was strongly censured; that said remarks were made in the presence and hearing of the regular panel of jurors, the most of whom were jurors in the trial of the case at bar. The remarks of the judge complained of are set forth in an affidavit of one of defendant's counsel, and attached to an amendment to the motion for a new trial. We cannot regard the affidavit as part of the record. The language alleged to be objectionable should be presented in a bill of exceptions (*Rayburn v. Railway Co.*, 74 Iowa, 637), and we may say, further, that the examination of the jurors, as to their qualifications to try this case, shows that they were not influenced, nor in any way prejudiced against the defendant, by the alleged remarks.

II. It is claimed by the state that while one F. M. Israel was attempting, with a crowd of other persons, to get on a car at Oak Park, near the city of Des Moines, the defendant crowded upon Israel from behind, put his arms about him, and put his hand in the pocket of his pantaloons, and stole therefrom a pocket-book or wallet containing seventy or eighty dollars. The contention of defendant is that the evidence was not sufficient to warrant a verdict of guilty. We have given the testimony of the witnesses a careful examination, and our conclusion is that we ought not to reverse the judgment on this ground. There is no dispute that Israel's pocket-book and money were stolen at the time

1. APPEAL:
record only
considered.

2. LARCENY from
the person:
evidence:
identification:
leading ques-
tion.

and place named, and Israel positively identified the defendant as the person who crowded upon him, and put his hand in the pocket where the money was. We quote the following from his testimony: "Now, I will ask you who it was that had his hands around here, as you say, if you know. *Answer.* It was this gentleman, Fred. Hall. I did not know him at the time. Where was your money at that time? *A.* In my left-hand pants pocket. You say you felt somebody's hand in your pocket? *A.* Yes, sir. At this time, where was this man's head? *A.* He was right against my shoulders. He was right against me, hugging me. Were there any other parties there at the time? *A.* Yes, sir. * * * I will ask you when you afterwards saw this defendant. *A.* I saw him in perhaps an hour afterwards. Where? *A.* I saw him at police headquarters. Look at this defendant, and state whether or not he is the man who had his hand in your pocket. (Objected to as leading, and pointing out the man for the witness. Objection overruled. Defendant excepts.) *A.* Yes, sir. I would say that was the very identical man that had his hand in my pocket. What man do you mean? *A.* Fred. Hall."

That this evidence is sufficient to sustain the conviction there can be no question, and the witness is to some extent corroborated by the testimony of two of his children, who were with him at the time. The objection to the question in which the defendant was pointed out to the witness is not well taken. It will be seen that the witness had before that said that "it was this gentleman, Fred. Hall." We do not determine whether the question was improper, if the witness had not already designated the defendant as the criminal. Israel stated in his testimony that he was relieved of his money at about six o'clock in the evening. Another witness stated that he saw Israel get on the cars, and that it was "probably about six o'clock." There is no evidence by which the exact time can be determined. There is evidence in the record on the part of the defense which tends to show that the defendant left Oak Park and

The State v. Hall.

came to the city on a train before six o' clock; and then, again, there is evidence from which it may fairly be claimed that he did not leave Oak Park until after that time. All of this evidence was proper to be considered by the jury. But it was not of that positive character, with reference to the time that the crime was committed, as required the jury to find that the defendant was not at the place at the time the money was stolen. The crime was committed on Sunday, and there was a camp-meeting at Oak Park at the time. There was a large number of people on the grounds, and the cars running to and from the meetings were crowded. The evidence shows that it takes about an hour for a train to make the round trip. But there is no evidence that the trains were run on any schedule time. When it was attempted to run these Sunday trains at intervals of twenty minutes, they got "mixed up" and out of time.. Counsel for defendant assume that the money was stolen at six o'clock. The jury were not required, under the evidence, to find that the precise time was six o'clock. About all that can fairly be said is that it was in the evening, when many of the people on the grounds were returning to their homes in the city. It may have been a half hour before or after six o'clock.

In conclusion, we have to say that the fact to be determined by the jury was whether the defendant was the man who stole Israel's money, and not whether it was stolen at exactly six o'clock; and, in our opinion, the jury were fully warranted in finding the defendant guilty. In view of the positive identification of the defendant, it was for the jury to determine, from all the evidence, whether the identification, as testified to by Israel and his children, was true or not.

AFFIRMED.

HUBBARD V. WEARE.

HERVEY *et al.* v. THE SAME.

SAVERY V. THE SAME.

1. **False Representations: GIST OF ACTION : SCIENTER : ACTIONS AT LAW AND IN EQUITY.** The gist of liability for damages for false representations is that an intentional wrong has been committed to the injury of another; the wrong being in representing as true that which is known to be false, as an inducement to the other to act to his injury. And in actions in equity as well as at law there can be no recovery on the ground of false and fraudulent representations, unless it be shown that the party making the representations knew them to be false, or that he made them under circumstances from which such knowledge will be inferred.
2. ——— : BY OFFICERS OF CORPORATION AS TO ITS CONDITION : PRESUMPTION. Before officers of a corporation make representations of its condition, as an inducement to others to take stock therein, it is their duty to use reasonable diligence to know that the representations are true; and they will be presumed to have used such diligence, and to possess the knowledge which its exercise would bring to them.
3. ——— : STATEMENTS MADE UPON ALLEGED PERSONAL KNOWLEDGE : ESTOPPEL. A person making a false representation as true to his personal knowledge will not be heard to say that he did not have knowledge that it was false.
4. ——— : BY OFFICER OF CORPORATION TO SELL STOCK : INTENTIONAL WRONG. Where an officer of a corporation, to induce others to take stock therein, makes material representations as to its financial condition which he knows to be false, yet with the confident belief that the corporation will soon be as represented, and that no loss will follow, commits an intentional wrong, for which he is liable.
5. **Corporations: ASSETS : DIVIDENDS.** The assets of a corporation consist of cash in hand and other property; and, if such assets exceed the liabilities, a dividend can lawfully be declared. Money paid out is not assets. If paid for property that is on hand, the property is assets; if expended in a way that has enhanced the value of the general assets, it is included in their valuation; if so expended as to have brought no property, or no enhancement of that on hand, then it is a loss, and should not be counted as assets.

79	678
93	532

79	678
110	111

79	678
111	339

79	678
112	637

79	678
113	470
113	471

79	678
126	87

79	678
132	280
132	403
132	405
132	407
133	615

79	678
135	460

79	678
144	622

Hubbard v. Weare.

6. ——— : ——— : WHAT ARE AND WHAT ARE NOT : SPECIAL CASES.
In considering what are and what are not to be considered as assets of a corporation, *held*—

- (1) That, in estimating the assets at the end of a certain year, the profits of the preceding year should not be included as a separate item, where no such profits have been declared, and have not in any way been separated or withdrawn from the general assets.
- (2) Money paid out for moving machinery and materials that went into the buildings should not be counted as a separate item, if the aggregate value of the buildings is given.
- (3) Money expended in exhibiting machinery at fairs enters into the value of the general assets, and should not be counted as a separate item.
- (4) Bills receivable should not be counted at their face without making such approximate deductions for loss as experience teaches to be inevitable.
- (5) While interest on bills receivable should be counted as assets, interest on bills payable should be estimated in the liabilities.
- (6) Money expended in the experimental construction of a new machine should not be counted as assets, but the actual value of the machine may be counted, if it has any; if not, the expenditure has been lost.
- (7) Expenses should not be included as a separate item; if wisely made, they only enhance the value of the general assets.

7. **False Representations: BY OFFICER OF CORPORATION TO SELL STOCK TO STOCKHOLDER.** Where the president of a corporation knowingly makes to a stockholder, who is not familiar with the condition of the company, false representations in regard thereto, showing the company to be prosperous when it is not, and thereby induces such stockholder to take and pay for more stock, he is liable in damages for the wrong done.

8. ——— : BY PRESIDENT OF CORPORATION TO VICE-PRESIDENT AND DIRECTOR TO OBTAIN CREDIT. A stockholder in a corporation, who is also its vice-president and a director, will be presumed to know the condition of the company, especially where there has been a special investigation thereof, and its losses have been ascertained, and a committee has reported that dividends previously declared were fictitious; and where, under such circumstances, he indorses for the company, it will be presumed that he does so, not relying upon any false representations made to him by its president as to its prosperous condition, but with the hope of saving it from bankruptcy; and he cannot recover of the president for loss incurred thereby.

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9. **The Same.** Where the vice-president and director in such case made a loan to the corporation after all its personal property had been mortgaged, of which mortgage the evidence shows he had knowledge, he cannot recover the amount loaned, from the president of the company, on the ground that the latter induced him to make the loan by falsely representing that the company had a large amount of property on hand from which could be realized the money to pay the loan.
10. ———: **BY PRESIDENT OF CORPORATION TO SELL STOCK : AGENCY.** Where the president of a corporation makes false representations to the agent of other persons, knowing them to be false, with the intent to induce such persons, or persons generally to whom the representations may be communicated as true, to take stock in the company, and they, relying thereon, do so to their injury, he is liable the same as if he had made the representations to the parties in person.

Appeal from Linn District Court.—HON. JAMES D. GIFFEN, Judge.

FILED, FEBRUARY 13, 1890.

THE Williams Harvester Company was organized as a corporation under articles dated May 13, 1878, fixing the capital stock at eighteen thousand dollars in shares of one hundred dollars, each, with the defendant as president, which position he continued to hold during all the time the company carried on business. The capital stock was increased by amendment of the articles, dated August 25 and recorded October 23, 1879, to one hundred thousand dollars; again, by amendment filed for record January 3, 1882, to one hundred and fifty thousand dollars; and again, by amendment filed for record December 11, 1882, to two hundred and fifty thousand dollars. The plaintiff Hubbard subscribed and paid for stock in the company as follows: July 1, 1878, in cash, five hundred dollars; October 22, 1879, dividend, \$187.50, cash, \$12.50, making two hundred dollars; February 21, 1880, cash, five hundred dollars; November 29, 1880, cash, three thousand dollars; December 3, 1881, dividend, one hundred and twenty dollars, cash, eighty dollars, making two hundred dollars; November 7, 1881, cash, five thousand dollars;

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December 13, 1881, cash, six hundred dollars; and December 13, 1881, for grandsons, two hundred dollars, being \$307.50 in dividends, and \$9,892.50 in cash. In addition to this, he loaned to the company on April 25, 1885, five hundred dollars, and again on June 15, 1885, five hundred dollars, taking the notes of the company therefor. He also, with others, indorsed notes of the company as follows: November 19, 1883, a note of five thousand dollars; March 31, 1884, note of five thousand dollars; and June 30, 1884, his acceptance for five thousand dollars,—which notes and acceptance are now outstanding. October 3, 1881, the plaintiffs Hervey, by N. M. Hubbard, subscribed and paid five thousand dollars for fifty shares of the capital stock of said company, for which a certificate was afterwards issued to said Herveys in their own name. On October, 1881, plaintiff Savery subscribed for one hundred shares of said stock; and, having thereafter paid ten thousand dollars in cash for the same, a certificate was issued to him therefor, dated November 7, 1881. Dividends were declared, for the year ending October 1, 1879, thirty-seven and one-half per cent.; for 1880, ten per cent.; and for 1881, sixteen and seventy-eight hundredths per cent. The plaintiffs each allege that they were induced to and did pay their money and incur the liabilities aforesaid by reason of certain representations made and caused to be made to them, respectively, by the defendant, which representations were false and fraudulent, and known to the defendant to be so at the time he made the same.

The representations set out by all the plaintiffs as being made by the defendant, and by which they were induced to subscribe and pay for stock, may be summed up as follows: (1) That said corporation was well organized and well conducted, upon a good business basis; (2) that it had made large gains and profits, and had actually earned the dividends declared; (3) that a greater dividend than ten per cent. might have been declared in 1880, but that it was thought best by defendant to hold a surplus; and (4) that there were sufficient

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profits and earnings to have declared a dividend of ten per cent. in 1882, but that the money could be used to great advantage in the business. The plaintiffs Hervey and Savery each also allege that they were induced to subscribe and pay for stock as aforesaid by the further false and fraudulent representations of the defendant that the dividends theretofore declared had been paid in cash, and that by reason of the dividends declared and paid, and to be declared and paid, the stock was worth a premium of twenty-five per cent. The plaintiff Hubbard also alleges that he was induced to make said loan of one thousand dollars by a false representation of the defendant, that said corporation had a large amount of property, promissory notes and securities on hand, from which means could be realized to repay said loan; when, in fact, as defendant well knew, said corporation had no personal property but what had been transferred to the First National Bank of Cedar Rapids. The plaintiff Hubbard also alleges that, by reason of all said representations, he was induced to sign two notes of five thousand dollars each, and said acceptance. Each alleges that the company is insolvent. The plaintiffs, Hervey and Savery, each allege that, when they discovered the fraud practiced upon them by the defendant, they tendered back in writing to said company said stock, by reason of said fraud, and demanded a return of their money, with interest; that said company, through the defendant and other officers, acceded to the demand, received back said stock, and by the defendant as president, and D. G. Edgerly as secretary, executed to plaintiffs notes for the amount paid for said stock, with interest, together with mortgages on certain real estate of the company to secure the same; that they foreclosed their said mortgages, and bid off the property on execution sale for amounts less than the judgment; that they thereafter caused special execution to issue, which was returned, "No property found." The plaintiffs each ask to recover damages, and the plaintiff Hubbard further asks that,

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as between the defendant and himself, the defendant may be decreed to pay said five-thousand-dollar notes and acceptance, and hold the plaintiff harmless therefrom. The plaintiffs Hervey and Savery allege that they are ready and willing to assign and turn over to the defendant, without recourse, the balance of said judgments, and they respectively demand an accounting of the money advanced and paid out by them for their stock, with interest, less the credit received by them on said judgments, after deducting costs, and that the balance be decreed to be due to them, respectively, from the defendant.

The defendant, in answer to each of the petitions, admits the organization of the company; that its articles were amended; that he was president thereof; that stock was subscribed and paid for at the times and in the amounts alleged; that dividends were declared as alleged; and that no dividend was declared or paid after December, 1881. As to the plaintiff Hubbard, he admits that he loaned one thousand dollars to and indorsed for the company as alleged, and that all the personal property of the company had been transferred to the First National Bank of Cedar Rapids before said loan. As to plaintiffs Hervey and Savery, he admits that they tendered back their stock, and received the notes and mortgages of the company as alleged, and that said mortgages were foreclosed and property sold as stated. Answering each plaintiff, he denies that any of said stock was taken or received by the plaintiffs at the instance or request of the defendant, or because of any statements or representations made by him; denies that he ever made any untrue, false or fraudulent representations whatever to the plaintiffs to induce them to take said stock, or to the plaintiff Hubbard to make said loan; and denies that said loan was made or stock subscribed because of any representations made by him. He denies that he made any concealment of the affairs of the company, or that indorsements by the plaintiff Hubbard and others were

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secured through any false or fraudulent representations of defendant, or because of any concealment by him of the affairs of said company. He denies that the plaintiff Hervey ever subscribed for any of the capital stock of said company, or paid to the defendant or said company any amount therefor. He denies that the company is insolvent, or that the execution against said company was ever returned, "No property found."

✓ The defendant avers that said company was legally organized; that the dividends were declared by the directors of said corporation after a careful investigation of the property, credits and other assets and liabilities of the corporation; that the corporation had sufficient, good and available assets, over and above all its debts and liabilities, upon which to declare said dividends, and that the same were declared in good faith; that the transfer of all the personal property of the company to the First National Bank of Cedar Rapids was made before the loan of one thousand dollars by plaintiff Hubbard, and with the full knowledge, and upon the request and demand, of said Hubbard; that said Hubbard has ever taken a lively interest in and maintained a close acquaintance with the affairs of said company, and that all acts of said company were known to and approved by him; that he had as full means of knowledge at all times as defendant, as to the affairs of said corporation; that he was a director during the year 1879, and until May, 1880, and as such participated in and actively urged a vote for declaring the dividend of thirty-seven and one-half per cent. He avers that the only stock of said company ever owned or held by the plaintiffs Hervey was shares received and purchased by them from N. M. Hubbard, who subscribed for the same in his own name, and for himself, and paid for the same by his own money. He further avers that he believed, at the time said dividends were declared, that said company had actually earned all the dividends named, prior to the time the same were made, and avers that all the dividends were so earned; and

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that at the time Hubbard received said Hervey stock he had full knowledge of the condition of said company.

The issues being in part the same, and the cases resting largely upon the same state of facts, they were submitted together in the district court, without being consolidated, under a stipulation that "the testimony offered and received in all of said cases shall apply to each one thereof, so far as it has reference to said causes, and that one transcript shall be made in all of said causes." The cases were brought and submitted as in equity, without objection, and, the district court having rendered judgment dismissing the plaintiffs' bills and for costs, plaintiffs appeal, and the causes are again submitted together upon the entire record.

C. A. & W. G. Clark and *F. F. Dawley*, for appellants.

F. C. Hormel and *C. J. Deacon*, for appellee.

GIVEN, J.—I. Counsel have discussed with evident care and ability, and with extended citations, certain questions of law to which we first give attention. To notice each of the points made and authorities cited would extend this opinion to an unwarranted length.

The most material points discussed are whether knowledge that the representations were false and an intent to defraud must be proven in these cases. Appellants' contention is that in cases solely cognizable in chancery, in cases of concurrent jurisdiction in law, actions against officers of corporations, and against persons making false representations as true to their personal knowledge, they not knowing whether the representation was true or false, *scienter* need not be proven. There are authorities that seem to sustain this view, while others hold the contrary. The seeming conflict arises from failing to discriminate between the rule as to proving *scienter* and the manner in which it may be proved, and in confounding cases for relief on

1. FALSE representations:
gist of action:
scienter:
actions at
law and in
equity.

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the grounds of intentional fraud with those for relief on the grounds of mistake. The gist of liability for false and fraudulent representations is that an intentional wrong has been committed to the injury of another, the wrong being in representing as true that which is known to be false, as an inducement to the other to act to his injury. *Holmes v. Clark*, 10 Iowa, 427; *McKown v. Furgason*, 47 Iowa, 636; *Avery v. Chapman*, 62 Iowa, 145; *Allison v. Jack*, 76 Iowa, 205. The basis for relief against mistake is not that a wrong was intended, but because a wrong will result from the mistake, if relief is not granted. To grant such relief is the peculiar province of courts of equity. *Wilcox v. University*, 32 Iowa, 374; *Curry v. Supervisors*, 61 Iowa, 74.

We regard it as well settled in this state that, though equity will relieve against false representations innocently made, the law will not afford relief on the grounds of false and fraudulent representations, unless it be shown that the party making the representations knew them to be false, or that he made them under circumstances from which such knowledge will be inferred. We do not discern why a different rule as to *scienter* should apply in actions against officers of corporations, or those making false representations as true of their own personal knowledge, from that applied in other cases of false and fraudulent representations. The fact of guilty knowledge may be established in such cases by quite different proofs from that which would apply in others, but the rule that knowledge must be proven is the same. Appellants contend that, as these cases were brought and are being prosecuted in equity, they are entitled to relief without proving the *scienter*. As the cases were brought and have thus far been prosecuted in equity without objection, and are now submitted upon the whole record for trial *de novo*, we will consider them as in equity, without, however, determining whether they were properly so brought or not. We are clearly of the opinion that, whether tried at law or in equity, the same rule as to *scienter* must apply; for, clearly, we cannot have two

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different rules of law in the same state, for the same case, in the same court. If the relief asked, other than the recovery of damages, would make the cases of equitable cognizance, and triable in equity, still the question of damages must be measured by the same rules that would apply if tried at law.

II. The cases cited as forming exceptions to the general rule with reference to proving *scienter* relate to

2. —: by officers of corporation as to its condition: presumption. the manner of proving it, rather than to a variance of the rule. Officers of corporations, who hold out to individuals, or to the public, advantages which will accrue to

persons who take shares in their corporation, and invite them to take shares on the faith of their representations, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as facts that which is not so, but to omit no fact within their knowledge, the existence of which might affect the advantages held out as inducements to take shares. Such officers will be presumed to have known that which it was their duty to know. Before making representations as to the condition of the company as inducements to take stock therein or extend credit thereto, it is their duty to use reasonable diligence to know that the representations are true, and they will be presumed to have used such diligence, and to possess the knowledge which its exercise would bring to them.

Special emphasis should be given to these wholesome rules of the law, in view of the large investments that

3. —: statements made upon alleged personal knowledge: estoppel. are being made in corporate enterprises, where the investors must necessarily trust largely to the honesty and fidelity of the officers of the corporation for the manage-

ment of their investments. Outside investors can know but little of the affairs of the corporation, while its officers may and should know them fully. One who makes a false representation as being true to his personal knowledge, without knowing whether it is true or false, for the purpose of inducing another to act, and

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upon which he does act to his injury, should certainly be held liable for the deceit; and yet it is argued that he is not liable because he did not know the representation to be false. A person making a false representation as true to his personal knowledge will not be heard to say that he did not have knowledge as to its truth or falsity. Having assumed to have the knowledge, he should be taken at his word, and held to have known that the representation was false. In representing that he had personal knowledge as to the truth of the representation, when in fact he did not, he makes a false representation in asserting that he had the knowledge. Our conclusion is that, in all cases for relief on the grounds of false and fraudulent representations, the burden is upon the party asking relief to show by direct evidence, or by inference from facts proven, that the party making the representation knew it to be false.

III. These cases being actions for false and fraudulent representations, it must appear that the representations were made with intent to wrong or injure the parties to whom made. Such intention may be shown by direct evidence, or be inferred from the making of the false representations knowingly. Such intention may exist, though the party making the representations confidently believed at the time that no injury would result therefrom. For instance, an officer of a corporation, to induce others to take stock therein, makes material representations as to its financial condition, which he knows to be false, yet in the confident belief that the corporation will soon be as represented, and that no loss will follow; he surely commits an intentional wrong, notwithstanding his belief. The wrong is in inducing others to take stock in a corporation that is not as he has represented it to be. The parties taking stock under these circumstances are entitled to shares in a corporation such as he represented, but get shares in a company such as it was.

IV. Some difference is expressed as to what are profits, and how they are to be arrived at. This is fully

4. —: by officer
of corpora-
tion to sell
stock: inten-
tional wrong.

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5. CORPORATIONS : assets : dividends.

answered in *Miller v. Bradish*, 69 Iowa, 278, where it is said: "The assets, resources and funds of the corporation must consist of cash on hand and other property, and, if such assets exceed the liabilities, a dividend can be lawfully declared;" in other words, a profit exists. Money paid out is not on hand, and should not be reckoned as assets. If paid for property that is on hand, the property is assets. If expended in a way that has enhanced the value of the general assets, it is included in their valuation. If so expended as to have brought no property, or no enhancement of that on hand, then it is a loss, and should not be counted as assets.

V. Such being our conclusions as to the law, it remains for us to determine, from the facts in the cases: (1) Whether the defendant did make, or cause to be made, to the plaintiffs or either of them, as true, one or more of the representations alleged; (2) whether such representation was made to induce the plaintiff to whom made to act as it is alleged he did act; (3) whether the representation made was false; (4) whether the defendant knew the same to be false at the time of making it; and (5) whether the plaintiff relied upon the representation so made as true, and acted thereon, as alleged, to his injury.

VI. Before noticing the cases separately, we state the following as the most important and controlling of the many facts appearing in a somewhat voluminous record: Dyer Williams was the owner of a patent right for a certain kind of mower and reaper, together with a lot of patterns, moulds and machinery for manufacturing the same. In May, 1878, the Williams Harvester Company was incorporated for the manufacture and sale of these machines and others, with a capital stock of eighteen thousand dollars of which the defendant Weare took five thousand dollars, and the plaintiff Hubbard five hundred dollars, for which each paid in cash. The balance was taken by different persons, and paid for in cash, or property wanted by the company, at

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reasonable values. The company continued in business up to 188—, when it was forced to suspend for want of funds, and because of its property being applied in paying or securing its indebtedness, of which a considerable amount remained unprovided for. An improved machine was invented in 1880, and to a limited extent placed upon the market in competition with this company's harvester, in 1882, and more generally in 1883 and thereafter. This was no doubt one of the causes of the decline in the company's business, but does not fully account for the losses reported September, 1882, for to that date the competition was limited. To meet this competition, the company set about inventing and manufacturing a self-binder of its own, which, however, was not so far perfected as to be put upon the market during the life of the corporation. Considerable sums were expended in constructing this new machine. At the time of the organization the company purchased a manufacturing establishment with the view of converting it into an establishment for the manufacturing of their machinery. They also purchased a new location, ✓ to which the old establishment was moved. Statements of assets and liabilities were made to September first of each year by the superintendent and bookkeeper to the board of directors, on which, and so far as appears without further investigation, the board declared dividends as already stated; all of which were payable in stock, except the dividend for 1881, which was payable in one and two years, with six per cent. interest. No dividend was declared for 1882, there being a loss for that year. June 16, 1883, a committee was appointed to revise the statements of the company's business up to and including 1881. Their report made July 24, 1883, shows a loss of \$34,798.50 in 1881, instead of a profit of \$13,856.35 upon which the dividend was declared. Their report was based upon valuations as they found them to be in 1883, and not as they were in 1881. During these years, and for many years preceding, the plaintiff Hubbard and defendant were upon intimate business and social relations. Each seemed to have had full confidence in

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the business capacity and integrity of the other. They were both men of large business experience,—Hubbard as a lawyer of extensive practice, and Weare as a capitalist and banker. Weare was president and director of the Harvester company from its organization, and gave to the business of the company his personal supervision. Hubbard was a stockholder, and for a time one of the directors. He occasionally attended the meetings and visited the works, but did not exercise any direct supervision over the business, and did not at any time investigate the books of the company so as to know its condition financially. The plaintiffs, Herveys and Savery, were personal friends of Hubbard, but strangers to Weare. It was through Hubbard that Herveys took the stock, he subscribing for it for them; they making the payment and receiving the stock certificate in their own names. In doing so, they relied wholly upon what had been represented to them by Hubbard, as neither ever had any interview with Weare on the subject. Savery, acting upon representations made to him by Hubbard, sought and had an interview with Weare, after which he subscribed and paid for his stock. Savery had no knowledge of the company's affairs, except as gained through Hubbard and Weare; and Herveys had no knowledge concerning it, except as gained through Hubbard.

VII. Taking the cases in their order, we first consider that of the plaintiff Hubbard; and, first, as to the representations by which it is alleged he was induced to take and pay for stock. In view of the intimate relations between him and Weare, the relations of Weare to the company, his confidence in its ultimate success, and the evident desire to interest men of means, and in whom he had confidence, in the enterprise, leaves no doubt in our minds but that defendant did, from time to time, and for the purpose of inducing Hubbard to take stock, make the representations alleged. Indeed, it is scarcely denied that he did make those representations, and as being true; for he still contends that they were true, according to the facts as known at the time.

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VIII. Having found that the representations were made, we next inquire whether they, or either of them, were false. The representation that the company was well organized does not affect the rights of the parties in these actions. It is immaterial to their rights herein whether the amendments to the articles of incorporation were properly acknowledged or not. The grounds upon which it is claimed that the corporation was not conducted upon a good business basis is because dividends were declared when the same had not been earned; hence we do not consider this allegation separately.

Appellants contend that certain items were improperly included as assets, and others omitted from the statements of liabilities upon which the dividends were declared, and hence that it was not true that the corporation had made large gains and profits, and had actually earned the dividends declared, nor that a greater dividend than ten per cent. might have been declared in 1880. The profits upon which dividends were declared were arrived at by deducting what was stated as the liabilities of the company from what was stated as its assets. In the statement of assets to September 1, 1879, \$498.32 was included as profit of season 1878. No such profit had been declared, or in any way was separated or withdrawn from the general assets. The profit, if any, remained as a part of the assets, and was included in the application thereof. To state it as a separate item was to include it twice.

There was included in this statement of assets, "Moving account, \$67.58;" and, in the statement for 1880, "Moving account, \$1,608.41." It does not appear with certainty what these items represent. Appellants contend that it is money paid out for removing the works from the old to the new location. Appellee suggests that they represent the cost of bringing property the company had purchased and made a part of the plant from Chicago or elsewhere. We see no other reasonable explanation than that it was

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money paid out for moving machinery or materials, or both, that went into the buildings, and is, therefore, proper to be included in the assets; but not as a separate item, if the aggregate value of the buildings into which it entered is given. In 1879 the buildings were not valued as a whole, but in 1880 they were. The \$67.58 was, therefore, properly included as a separate item, and the \$1,608.41, in 1881, was not.

“Fair machines account, \$144.97,” was included as assets. Here, again, we are without definite explanation. Appellants contend that it was money paid out as expenses in exhibiting machines at the fairs, while appellee suggests that it represents machines on hand made for exhibition. Judging from the other items of the inventory and the amount, we conclude that it does not represent machinery on hand, but expenses of exhibiting machines. Whatever benefit comes to the corporation for such expenditure must be in the way of the enhancement of the value of its property and business, and not as in the case of the purchase of property which remained on hand. Entering, as it did, into the value of the general assets, it was covered by the estimate placed thereon, and should not have been included as a separate item.

“Outstandings, \$22,821.39,” was stated as assets in 1879. This is understood to include accounts mostly with agents and their customers for machines, some of which were in the hands of agents; others of which had been sold. No deduction was made for shrinkage or loss in collections. That a loss would occur is inevitable, and, though that loss could not be determined with exactness, experience would indicate about what it would be. Without such an approximation, the result would not show with any reasonable certainty the state of the company's affairs.

The statement for 1880 included as assets, “Accrued interest on bills receivable, \$756.22.” There is nothing included in liabilities for interest on the thirty-five thousand, five hundred dollars bills payable. It is argued that bills payable were largely to banks and for

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merchandise; that bankers require interest in advance; that the company, being prosperous, paid at maturity, so that no interest was accruing against it. Common experience, and the subsequent history of the company, hardly warrant such a conclusion. We think that an approximation should have been made of the accrued interest for which the company was liable.

“Material and labor expense on self-binder, \$1,708.78,” was also included as assets in the statement of 1880. This represents what had been expended in the effort to perfect the new self-binder. Valuations in 1880 were to be made according to what was then known. The value of this machine, other than as old iron, depended entirely upon whether it could be made to work successfully. It was not possible at that time to determine what its real value was, and hence it was put in at what it had cost. Those having confidence in the success of the invention no doubt valued it very highly, while those not having such confidence might not give it any value. The object of valuing the assets was to see whether any profit had been actually earned up to that time that might be divided among the shareholders. It required future developments to determine whether the binder was of any value or not, and until it had an actual value it should not have been included as assets. The amount expended upon it was not assets, but a loss, that would come back or not, as the machine would or would not prove successful. Surely, as yet, there was nothing in the machine to divide; and in estimating the profits for the purpose of division, and as an inducement to persons to take stock, no such an uncertain element should have been included.

We have already considered the \$1,608.40 moving account included in the estimate of 1880. There was also included, “Expenses, \$391.99.” We are unable to see how money that had been paid out as expenses can be considered as assets on hand for distribution, except as it has entered into the property on hand in the enhancement of its value. The property being estimated at its value, this item should not have been included.

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“Bindery account, \$2,919.59,” is included in the statement of assets for 1881 as profits. Appellants claim that it was a total loss, and should have gone to the other side of the account, thus making a difference in the result of \$5,839. The *status* of the new binder was about the same in 1881 that it was in 1880; that is, it was incomplete, and it had not yet been demonstrated whether it would be successful or not. While we are not prepared to say that this sum should have been included as a loss, we are satisfied, for the reasons already stated, that it should not have been included as profits or assets. No dividends were declared for 1882.

The results arrived at by the committee, in its review of the statements up to and including 1881, are not entitled to much consideration, as their estimates were based upon facts disclosed following the several dates at which dividends had been declared. In determining whether the dividends were earned, we must take the facts as they existed at the time they were declared. From what we have stated, it will be seen that our conclusions are that it was not true that the company had made large gains and profits, and had actually earned the dividends declared, nor that a greater dividend might have been declared in 1880 or 1882.

IX. Our next inquiry is whether the defendant knew the representations made to be false at the time he made them. As already stated, it was SAME AS NUMBER 4. his duty, as president of the company, to use reasonable diligence to know that the representations he made were true, and he will be presumed to have used such diligence, and to have possessed the knowledge which its exercise would bring to him. Reasonable diligence did not require that he should have in person made the statement and calculations upon which the dividends in question were declared, but it did require that, before representing them as true, he should have so far reviewed them as to see that no improper items of considerable amount were included therein. On each occasion, when dividends

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were declared, steps were taken for the further sale of stock. The character of the statements indicate a purpose to make large showings of profits,—a purpose that was apparent upon casual examination of the statements. In view of the defendant's business experience and close attention to the affairs of this company, we are satisfied that the improper character of the statements upon which dividends were declared, and the efforts to force favorable balances, did not escape his notice. We think it fairly appears, from all the facts proven, that defendant did know that sufficient profits had not been actually earned to justify either of the dividends declared. It is contended that no intent to injure plaintiff Hubbard can be inferred, because in his testimony he acquits the defendant of any bad faith. Such expressions do occur in the testimony, but, taking the whole testimony together, it is evident that the plaintiff did not intend to be understood as withdrawing his charge of intentional wrong. The defendant's investments and representations satisfy us that he confidently believed that the corporation would ultimately be so successful as to justify the investments being made in its stock. It does not appear that even Hubbard ever thought that Mr. Weare intended or expected that he would lose by the investments in the stock, yet the bad faith, the intention to wrong, was in representing that dividends had been earned, when the defendant knew they had not.

X. We next inquire whether the plaintiff Hubbard did rely upon the representations made, and whether he was induced thereby to subscribe and pay for all or any of the stock taken and paid for by him. It is not necessary that he should have been wholly influenced to take stock by the representations; it is sufficient if the representations constituted a material part of the inducement. It is contended that Hubbard acted upon his own knowledge of the company's affairs; that he was not only a stockholder, but director and vice-president, and took an active interest in the business, and

7. FALSE representations: by officer of corporation to sell stock to stockholder.

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was as well informed with respect thereto as the defendant. Hubbard's last subscription for stock for himself was in December, 1881, and he was not director nor vice-president until May, 1883. While there is some conflict in the testimony as to the attention he gave to the business of the company, we are satisfied that prior to 1883 it was but casual, and that he did not at any time make any investigation as to the earnings or financial condition of the company, but relied upon what was represented to him by the officers, and particularly by the defendant. It does not appear that prior to 1883 Hubbard did more than to occasionally attend the meetings and visit the factory. He had nothing whatever to do with the making of the statements upon which dividends were declared, nor with declaring the dividends. There is testimony tending to show that the statements were sent to all the stockholders, but Hubbard denies ever having examined them, if received by him. Mr. Weare was a man of large business experience, in whom Hubbard had full confidence. He was giving his personal supervision to the business of the company, while Hubbard was otherwise engaged. We fully concur in the finding of the district court, that Hubbard purchased the stock "relying upon the representations of the defendant, and believing them to be true, and without any investigation into the true condition of the company's affairs and financial condition." We think it fairly appears that Hubbard relied upon the representations of the defendant as to the earnings of the company, and was induced thereby to take and pay for the stock that he did, except as to the five hundred dollars taken and paid for July 1, 1878.

XI. The indorsements against which plaintiff Hubbard asks relief were made November 9, 1883, and March 31, and June 30, 1884. He claims that he was induced to make these indorsements by the same representations that induced him to pay for stock. These indorsements were not made until after he was elected director and vice-president, and after the

8. —; by president of corporation to vice-president and director to obtain credit.

Hubbard v. Weare.

losses for the year ending September 1, 1882, were ascertained, which losses, the plaintiff says, were more than eleven thousand dollars; and not until after the report of the committee, June 24, 1883, showing, as plaintiff says, "that all of the dividends were fictitious." While it appears that Hubbard took but little more part in the business after his election, in 1883, than before, yet, in view of his official relation to the company, and the ascertainment of these large losses by committee and otherwise, we may fairly presume that he knew of the loss and report before making either of the indorsements, and, knowing it, no longer relied upon the defendant's representations as to profits. We think that he, with others, joined in the indorsements, hoping to save the company from bankruptcy, and themselves from further loss, and that he is therefore not entitled to the relief asked, as against these indorsements.

XII. Plaintiff Hubbard contends that he was induced to make the loan of one thousand dollars by a representation of the defendant that the corporation had a large amount of property on hand, from which means could be realized to pay the loan, when in fact its property had been transferred to the First National Bank of Cedar Rapids. On July 17, 1884, a mortgage was executed to the bank on all the company's personal property. This mortgage was not filed for record until January 5, 1886. There is much conflict in the testimony as to whether the plaintiff Hubbard knew of this mortgage before making the loan. We have examined the testimony carefully, and are of the opinion that the weight of the evidence is in favor of the conclusion that the plaintiff knew of the transfer at the time the mortgage was executed, and did not, therefore, rely upon the representation alleged in making the loan. Our conclusion, upon the whole case, is that the plaintiff Hubbard is entitled to recover of the defendant Weare all amounts paid in cash for stock, except the five hundred dollars paid in July,

9. THE SAME.

Hubbard v. Weare.

1878, with six per cent. interest from the time of payment; and that he is not entitled to any part of the relief asked as to the loan of one thousand dollars, or the indorsements made by him for the company.

XIII. In the case of Herveys, plaintiffs, the first contention to be noticed is whether the stock held by them was taken from the company by them, or by N. M. Hubbard. They claim that Hubbard subscribed for the stock for them, and that they paid for it, and received the certificate in their own names; while appellee claims that Hubbard subscribed and paid for the stock, and sold it to Herveys. It appears conclusively that Weare and others desired that the increase of stock authorized should be disposed of, and, as far as practicable, to friends of those already interested. Hubbard named to Weare the Herveys and Savery, as persons who would take stock, and he, under authority from Herveys, subscribed for the fifty shares, which they afterwards paid for, and received a certificate in their own names. This stock was carried on the books of the company in the name of Herveys. We have no doubt that these shares were taken for and were the property of Herveys from the beginning. They acted through Hubbard as their agent, and were induced to authorize him to take the stock for them solely by his representations as to the condition of the company. Hubbard testifies that he communicated to them just what Weare had represented to him, and that he was induced by Weare's representations to take the shares for Herveys. If Weare made false representations to Hubbard, knowing them to be false, with the intent to induce persons named, or persons generally to whom the representations might be communicated as true, to take stock, and they, relying thereon, did so to their injury, he is liable the same as if he had made the representations to the parties in person. If he made false representations to Hubbard, knowing them to be false, with intent to induce the taking of stock, and Hubbard, relying

10. —: by president of corporation to sell stock: agency.

Hubbard v. Weare.

thereon, took stock for Herveys as their agent, to their injury, Weare is liable, the same as if the representations had been made to Herveys in person. We have found that Weare did represent to Hubbard that there had been sufficient earnings to justify the dividends declared, two of which preceded this subscription; that said representation was false, and known to Weare to be so, and was made to induce the taking of stock. That Hubbard communicated this representation to Herveys is uncontradicted, and we have no doubt but that they were induced thereby to authorize Hubbard, as their agent, to take the stock for them, and he, as such agent, was induced to and did so take it. It follows, from these conclusions, that the plaintiffs Herveys are entitled to the relief demanded.

XIV. In the case of J. C. Savery, plaintiff, it appears that, although N. M. Hubbard had communicated to him the statements of defendant
SAME AS NUMBER 4. Weare, Savery did not act thereon, but sought and had an interview with Weare in person, before taking the one hundred shares of stock that he did take. Savery testifies that he "came to Cedar Rapids for the purpose of investigating the thing before subscribing." He testified unqualifiedly that defendant Weare told him generally about the business, and reported it to be a very profitable investment; that the dividends were paid out of the profits; "Did not say they had been paid in stock;" that they had not only paid the dividends, but had a surplus; and that the stock was worth \$1.25 as an investment. Weare has no recollection of this interview, but does not doubt that it occurred, because he "was in a situation to be called upon by people inquiring about this or that institution in a pecuniary point of view." We do not understand him as admitting that he made the statements testified to by Savery, but the fact that dividends had been declared, and the fact that similar statements had been made to Hubbard, go far to corroborate the testimony of Savery. Appellee contends that he did not know

Hubbard v. Weare.

that Savery contemplated taking stock, and, therefore, his statements, whatever they were, were not intended to induce him to do so. It is evident he and Hubbard had talked of Savery taking stock before, and the character of Savery's inquiries must have indicated that purpose. Without enlarging upon the facts, we announce as our conclusion that the defendant, Weare, did make to the plaintiff Savery the representations alleged, as an inducement to subscribe for stock; that said representations were false, and known to the defendant to be false; and that the plaintiff Savery, relying thereon, was induced thereby to take and pay for one hundred shares of said stock, to his injury, and that he is entitled to the relief demanded. The judgment of the district court in each case is reversed, and the cases are remanded for further proceedings, and judgment in accordance with this opinion.

REVERSED.

REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA,
AT

79	703
82	396
79	708
98	667

DES MOINES, MAY TERM, A. D. 1890.

IN THE FORTY-FOURTH YEAR OF THE STATE.

PRESENT:

HON. JAMES H. ROTHROCK, CHIEF JUSTICE.	
HON. JOSEPH M. BECK,	}
HON. GIFFORD S. ROBINSON,	
HON. CHARLES T. GRANGER,	
HON. JOSIAH GIVEN,	
	JUSTICES.

THE STATE V. THOMPSON.

1. **Seduction: EVIDENCE.** In a prosecution for a seduction, the testimony of the prosecutrix that she understood that the defendant had living children other than the one borne by her was improperly admitted, as it was not relative to any issue in the case; and it was prejudicial to the defendant.
2. ———: ———: **SECONDARY.** In such case it was prejudicial error to permit the prosecutrix to testify that defendant had written to her and others that he was not the father of the child. The letters were the best evidence of what he had written, and there was no offer to produce them nor to account for them.

The State v. Thompson.

8. ——— : ——— : SUBSEQUENT OFFER AND REFUSAL OF MARRIAGE. In such case the facts that defendant, after the seduction, offered to marry the prosecutrix, and that she refused, were competent only as bearing upon the question whether or not the alleged seduction was accomplished by means of a promise of marriage. Such offer of marriage, when not accepted by the prosecutrix, is no bar to the prosecution, under section 3868 of the Code.

Appeal from Ringgold District Court.—HON. R. C. HENRY, Judge.

FILED, MAY 8, 1890.

THE indictment in this case charged the defendant with the seduction of one Nellie Patterson, alleged to be an unmarried woman of previous chaste character. Upon a trial, the defendant was found guilty, and sentenced to imprisonment in the penitentiary. He appeals.

Laughlin & Campbell, for appellant.

John Y. Stone, Attorney General, for the State.

ROTHROCK, C. J.—It appears from the evidence in the case that in August, 1885, the complaining witness
1. SEDUCTION: was a young girl, and resided with her
evidence. parents on a farm in Ringgold county. The defendant is a young man, and is a resident of the same neighborhood. At about the date above named, the defendant commenced paying his addresses to her, and continued to be her suitor until March, 1886, when he went to the state of Nebraska. During the courtship, the parties were engaged to be married, and they indulged in sexual intercourse. The defendant remained in Nebraska until January, 1887, when he returned and remained for a time, and they again had improper relations with each other. The defendant returned to the state of Nebraska, and the result of the improper intercourse was that the prosecuting witness was delivered of a child in November, 1887. The evidence as to the promise of marriage is quite satisfactory. Indeed,

The State v. Thompson.

it was not denied by the defendant in his testimony as a witness upon the trial; and there is evidence from which the jury were fully warranted in finding that the sexual intercourse between the parties was the result of defendant's promise of marriage. While the defendant was in Nebraska several letters were written by the parties to each other. In the examination of the prosecutrix as a witness, counsel for the state asked her this question: "Is it not a fact that you understand the defendant has got other living children?" The defendant objected to the question, as being incompetent; the objection was overruled, and the witness answered the question in the affirmative. This evidence was, in our opinion, improper, in any view of the case. It did not tend to prove the illicit intercourse, nor that it was the result of a promise on the part of the defendant to marry the witness. It appears from other evidence in the case that the prosecutrix heard these rumors before she claimed to have been seduced, and there is some plausibility in the thought that the evidence was as prejudicial to the prosecution as to the defense. But the fact remains that the question and answer had a direct tendency to prejudice the defendant in the estimation of the jury.

II. Another question propounded to the witness was as follows: "Is it not a fact that he has written
2. —: —: to you and others in your neighborhood,
secondary. charging others with being the father of your child?" This question was objected to, for the reason that the letters would be the best evidence, and that it is hearsay and incompetent. The objection was overruled, and the witness answered as follows: "Yes, sir; he wrote back that he was not the father of the child." This evidence was plainly incompetent. It directly tended to induce the jury to believe that the defendant was guilty of the perfidy of seducing the plaintiff, and then attempting to charge the paternity of the child upon others; and there was no offer to produce the letter or letters referred to by the witness, nor

The State v. Thompson.

to show that they were lost, so as to authorize secondary evidence of their contents.

III. Other errors are complained of which we need not determine, as they will not probably arise upon a new trial. But it is proper to say that we think that during the trial too much importance was attached to the fact that at one time, after the alleged seduction, the prosecutrix refused to marry the defendant. This refusal is fully explained by her as being born of her remorse in having surrendered her virtue to the defendant. It is well to bear in mind that the crime upon the part of the defendant was complete if he seduced the prosecutrix, and led her away from the paths of virtue, and that he accomplished his purpose by a promise of marriage. The subsequent correspondence between the parties, and their subsequent acts and conduct, are competent evidence as bearing upon the question of seduction, and that only. If the prosecutrix at one time refused to marry the defendant, the refusal would be evidence upon the question whether she intended to marry him when the criminal intercourse took place. And the same may be said with reference to the alleged willingness of the defendant to marry the prosecutrix. It is to be remembered that this is a criminal prosecution, and not a civil action, for seduction. The statute (Code, sec. 3868) provides that "if before judgment upon an indictment the defendant marry the woman thus seduced, it is a bar to any further prosecution for the offense." The mere willingness of the defendant to marry the woman is no bar. It may be a proper fact to be considered upon the question as to whether the woman was really seduced, or to be presented to the court at the proper time, in mitigation of punishment. For the errors above pointed out the judgment of the district court is

REVERSED.

3. —: —: sub-
sequent offer
and refusal
of marriage.

Richards v. The Osceola Bank.

79	707
93	789
105	737

RICHARDS V. THE OSCEOLA BANK *et al.*

1. **Appeal: FROM JUDGMENT ON INTERVENTION: WAIVER.** In an action on a bond there was judgment against defendants, from which they did not appeal, but the issues arising upon a petition of intervention were in the express language of the judgment reserved for subsequent proceedings. *Held* that, though these issues might have been determined in the main case, yet, since they were so expressly reserved, defendants did not waive their right to appeal from the judgment on such issues by failing to appeal from the judgment in the main case.
2. **Banks and Banking: BOND TO SECURE DEPOSIT OF COUNTY FUNDS: SURETIES: COLLATERALS: RIGHTS OF VICE-PRESIDENT AND COUNTY TREASURER.** The defendant bank received of the plaintiff, county treasurer, the funds of the county on deposit, and the bank executed its bond to secure the same, under section 912 of the Code, with C., the vice-president of the bank, and another, as sureties. C. was authorized to pay debts of the bank and to give security for the same, and it was he who executed and gave, in the name of the bank, the bond above named. *Held*—
 - (1) That C. was authorized to turn over to plaintiff, as treasurer, notes belonging to the bank, as collateral security for the deposit secured by the bond.
 - (2) That the treasurer was authorized to receive and hold such collateral in addition to the bond.
 - (3) That the sureties on the bond had a right to demand that these collaterals should be exhausted for the payment of the deposit before their property should be taken on execution therefor.
3. **—: RECEIVERS: RIGHTS OF DEPOSITORS: SURETIES: LIENS.** Where a bank owning real estate has passed into the hands of a receiver, and a county treasurer who has deposited county funds in the bank, and has taken a bond with sureties to secure the deposit (Code, sec. 912), afterwards procures judgment against the bank for the deposit, such judgment is not a lien upon the real estate of the bank, so as to entitle the sureties on the bond to have such real estate exhausted in payment of the judgment before they are made liable on execution; but such real estate is assets in the hands of the receiver for the benefit of all depositors ratably. (See Code, sec. 1572.)

Appeal from Clarke District Court.—HON. J. W. HARVEY, Judge.

Richards v. The Osceola Bank.

FILED, MAY 8, 1890.

ACTION upon a bond given pursuant to Code, section 912, by the Osceola Bank, with C. W. and G. H. Cowles, sureties, to secure deposits in the bank made by the plaintiff as county treasurer. Findley, as receiver of the bank, intervened in the action. Judgment was rendered for plaintiff on the bond, and for the intervenor in the intervention proceedings. The defendants Cowles and Cowles and the plaintiff appeal.

McDill & Sullivan and *M. L. Temple*, for appellants Cowles and Cowles.

W. M. Wilson, for appellant Richards.

John Chaney, for appellee Findley.

BECK, J.—I. The petition shows that the Osceola Bank, under Code, section 912, was selected by the supervisors of the county as a depository for county moneys, and executed a bond, as required by the statute, with Cowles and Cowles as sureties; that there is due from the bank on plaintiff's deposit account \$4,839.65, which it has failed to pay; and that in proceedings instituted upon the relation of the attorney general a receiver was appointed, who holds all the assets of the bank. The bank made default, but the defendants Cowles and Cowles answered, admitting the execution of the bond, and, in effect, all the allegations of the petition. They allege that the fact of their relation to the case as sureties was well known to plaintiff from the beginning, and as such they are entitled to have all the property of the principal, the bank, which is solvent, first exhausted. They further allege that, before the proceedings were instituted resulting in the appointment of the receiver, the bank gave plaintiff further security, consisting of certain notes, stocks and other securities, amounting to more than nine thousand dollars, a part of which plaintiff

Richards v. The Osceola Bank.

had collected, to the benefit of which they are entitled by the application of the avails of these securities upon the bond. The receiver filed his petition of intervention, alleging that he is entitled to the possession of the notes and securities given to plaintiff; that the transfer thereof was illegal and void, and plaintiff acquired thereby no interest therein; and he prays that the plaintiff be ordered to transfer the securities to him. The bank made default, and judgment thereon was entered; and judgment was also rendered against Cowles and Cowles upon the admissions made in their answer. The judgment contained an order in the following language: "This cause is continued as to the collateral notes mentioned, the answer of defendants and the petition of intervention of B. F. Nex, receiver." The court in the same judgment made this further order: "The plaintiff is ordered to turn over the collaterals to the clerk of this court for collection; and he, the clerk aforesaid, is hereby ordered to collect the same, to-wit [describing each note by name of maker, date, amount, interest and date of maturity; the total amount of notes being \$9,551], and to hold the proceeds thereof subject to the orders of this court hereafter to be made." The defendants, in their answer, allege that the notes were transferred by the bank prior to the appointment of the receiver, and were not the property of the receiver when he took possession of the bank assets; that the referee held the notes until they were turned over to the clerk, and that officer has, since they have been in his hands, collected two thousand dollars thereon. It is further averred that an execution has been issued upon the judgment and levied upon lands of one of the defendants. Defendants ask that the proceeds of the notes be applied on the judgment, and that no execution thereon be enforced until the notes be collected and applied on the judgment. The original receiver resigned, and Findley was appointed in his place. The plaintiff answered the petition of the intervenor, alleging, among other things,

Richards v. The Osceola Bank.

that the notes were indorsed to plaintiff by the bank, and turned over in good faith. Other allegations of the answer need not be recited. By agreement the case was transferred to the equity docket, and tried as a chancery case. C. W. Cowles filed a separate answer and cross-bill alleging, after stating matters set up in the prior pleadings of the defendants, that the bank holds the title of certain real estate, and that the judgment in this case is a lien thereon, and praying that, until the judgment be enforced against such real estate, and the notes held by the clerk be collected and applied on the judgment, it be not enforced against him.

The notes were delivered to the county treasurer as security for deposits made by the county in the bank by G. H. Cowles, the vice-president, who appears to have transacted the business of the bank. He executed the bond sued upon in the name of the bank, by himself, as vice-president. The notes were given as security to plaintiff upon his request and the request of the county attorney. The court, upon the issues between the intervenor Findley, the receiver, and the plaintiff and defendants, found that the bond in suit is "ample security to the county, and that the county treasurer had no right, authority or power to take the promissory notes turned over as additional security," and there was no consideration therefor, and the transfer was, therefore, illegal and void. The court further held that the judgment upon the bond is not a lien upon the real estate owned by the bank, for the reason that it was then in the hands of the receiver, and that defendants had no equities or right which require property of the bank to be exhausted before the judgment can be enforced against defendants' property.

II. It is first insisted by the intervenor and plaintiff that, as defendants did not appeal from the judgment upon the bond, and their appeal is from the judgment upon the proceedings of intervention, they cannot in this appeal insist that the orders and judgment in the proceedings

1. APPEAL: from judgment on intervention: waiver.

Richards v. The Osceola Bank.

of intervention are erroneous; for the reason that they could have raised the same issues and had them determined upon the trial in the main case. Let it be assumed that this could have been done. Yet the record of the judgment shows that the issues raised in the intervention proceeding were, in express language, reserved for decision in subsequent proceedings, and the cause was continued for the purpose of trying and determining these issues. The correctness of the judgment in that regard is brought in question by some of the parties.

2. BANKS and
banking :
bond to se-
cure deposit
of county
funds : sure-
ties : collater-
als : rights of
vice-president
and county
treasurer.

III. The points made by the intervenor in support of his claim to the notes in question, and his objections to the relief prayed for by defendants, are presented in the argument of his counsel in three points, which we shall proceed to consider. The first is in this language :

IV. "1. The defendant George H. Cowles had no right or authority, under the circumstances, to turn over the notes in question to the treasurer (plaintiff herein) as collateral security to secure the county for said deposits, and that his act in so doing was illegal and void, and did not bind the bank, and which the bank or the receiver had the right to repudiate, and recover back the notes." This position by counsel is disposed of, briefly, by these considerations : George H. Cowles was the vice-president of the bank, and authorized to do business for it. It cannot be denied that he was authorized to execute the bond, and it is not claimed that his authority to do business for the bank was in any manner or degree restricted. He was authorized to pay debts of the bank, and to give security for the payment of the bank debts, when such security is authorized by law ; for he did execute and give, in the name of the bank, the bond in suit, and it is not shown that he was thereto empowered by the bank, by any act, consent, or any authority, in any form, expressed or implied. If he had authority to give the

Richards v. The Osceola Bank.

bond as security he surely was authorized to give the collaterals, if the treasurer had the right to receive them. This brings us to the consideration of the second point made by intervenor's counsel.

V. The second point is as follows: "2. The county treasurer (plaintiff) had no legal right to accept the same as security for the funds deposited in said bank, either as a protection to himself and bondsmen, or as additional security to the county." It is quite as readily disposed of as the first. It cannot be doubted that, in the absence of any statutory prohibition, the county treasurer was authorized to demand and recover from the bank the money due the county. Surely, if he had such authority, he could accept security from the bank for its indebtedness. It would be strange, indeed, if any law existed prohibiting the county treasurer, the financial officer of the county charged with the duty of collecting the debt owed by the bank, from accepting security where, in his judgment, it is demanded. It would be an absurd rule forbidding the county treasurer, in the discharge of his duty, to do an act for the protection of the county when his judgment, as a faithful officer, directed it. The statute (Code, sec. 912) providing for security by bond to be given by a bank before deposits of county money are made therein does not forbid the county treasurer to take other security if, in his judgment, it is demanded. Other creditors of the bank cannot complain, for the notes were taken in the exercise of the undoubted right of a creditor, in the exercise of diligence, to secure his claim by taking collateral security of this character.

VI. The last position of counsel is expressed in this language: "3. In case it should be held by this court that the plaintiff, for the benefit of the county, had the right to hold said notes as additional security for the judgment in question, then we contend that they can only be held for the payment of any balance, if any, remaining after exhausting all property belonging to defendants George H. and C. W. Cowles subject to execution." The consideration of this point requires us

Richards v. The Osceola Bank.

to keep distinctly in mind the character of the transaction. Defendants are the sureties of the bank. The notes were given as further security. It must be remembered that these notes are the property of the bank. The case, then, is this: Property of the bank is given by the bank, as security, in addition to the bond of defendants. Now, defendants, as sureties, must be protected, and not held liable to execution, as long as the debt may be realized from the principal, or, rather, the property of the principal must be first exhausted before the claim may be enforced against the surety. Of course, this rule is to be so enforced that unreasonable delay and expense shall not be imposed upon the creditors. Surely, we will not be expected to cite authorities to support these familiar doctrines. Under these rules the notes given to plaintiffs as collateral security, and now held by the clerk of the court, must be used in the payment of the judgment against defendants.

VII. Defendants, as to other assets of the bank, have no priority over the other creditors. They hold no lien or equity which requires the appro-

8. —: receivers:
rights of de-
positors: sure-
ties: liens.

priation of the proceeds of other assets to the payment of the debt for which they are sureties. The assets of the bank went into the hands of the receiver before the action on the bond had been commenced. The assets of the bank were subject to the jurisdiction of the court, and in its custody, before this action was brought. Of course the lien and equities arising before this jurisdiction was acquired were not prejudiced or affected thereby. The notes before pledged to the treasurer, therefore, remained subject to the pledge. But the action on the bond created no lien which defeated the distribution of the assets of the bank as provided by law. If it did, thus would the law be subject to be defeated at the option of creditors. The statute providing for the appointment of a receiver and winding up banks, under which the receiver was appointed in this case, requires that the assets should be "ratably distributed among

The State v. Baldwin.

the creditors, * * * giving preference in payment to depositors." Code, sec. 1572. Now if, after the court, in the receiver proceedings, obtains jurisdiction of the assets of the bank, a creditor may commence an action and obtain a judgment which would be a lien, and interfere with the ratable distribution of the assets to all the creditors, it is plain that the statute would be defeated at the option of the creditor. This cannot be permitted. The judgment obtained by the plaintiff against the bank cannot be enforced against the real estate of the bank so as to protect defendants and defeat the application of the avails thereof to the payment of all deposits ratably.

We reach the conclusion that the notes given to the county treasurer as security for the county deposits must be first applied upon the judgment against defendants George H. and C. W. Cowles. Any balance remaining after the payment of the judgment shall be applied to pay the depositors ratably. The proceeds of the real estate belonging to the bank shall not be subject to the lien of plaintiff's judgment, so as to defeat the application of the proceeds to the depositors ratably, but they shall be so applied. The decree of the district court shall be reversed and remanded for a decree in harmony with this opinion, or, at defendants' option, such a decree may be entered in this court. The intervenor (Findley, the receiver) shall pay the costs of this appeal.

REVERSED.

THE STATE V. BALDWIN.

1. **Murder: IN PRODUCING ABORTION: INDICTMENT: TWO COUNTS.**
Where in the two counts of an indictment only one offense is charged, to-wit, the murder of a named woman by an attempt to produce an abortion upon her, and in the first count it is charged to have been committed with some instrument to the grand jurors unknown, and, in the second, by administering certain drugs to the grand jurors unknown, *held* that the indictment was not bad for duplicity. (See Code, sec. 4800.)

79 714
106 703

79 714
117 228
117 229
117 248

79 714
118 689

79 714
119 690

79 714
121 634
122 84

79 714
135 258

The State v. Baldwin.

2. ———: ———: ———: FIRST OR SECOND DEGREE. Neither count of the indictment in this case (see opinion) charges murder in the first degree, as neither charges an intent to take life. (See *State v. Gillick*, 7 Iowa, 312, and *State v. Johnson*, 8 Iowa, 525.)
3. ———: INDICTMENT FOR FIRST DEGREE: TRIAL FOR SECOND. Although an indictment charges murder in the first degree, the state may waive a trial for that degree and insist upon a conviction for a lesser degree of the offense.
4. ———: ACCESSORY BEFORE THE FACT: INDICTMENT: EVIDENCE. Since an accessory before the fact is a principal, under Code, section 4314, there is no variance between an indictment charging defendant as principal, and evidence which shows him to have been an accessory before the fact.
5. ———: DYING DECLARATIONS: ADMISSIBILITY: QUESTION FOR COURT. It is the province of the judge, and not of the jury, to determine, from all the surrounding circumstances, whether, in a prosecution for murder, the dying declarations of the deceased are admissible. (See *State v. Elliott*, 45 Iowa, 487.)
6. ———: ———: ———: CONSCIOUSNESS OF DANGER. Declarations made by decedent after she had heard her physician express the opinion that her symptoms were as bad as they could be, and that she might die at any time, and after she had expressed the belief that she was going to die, were admissible as dying declarations, as against the objection that she was not conscious of her danger when she made them.
7. ———: ———: CHARACTER OF: ADMISSIBILITY. The dying declarations of the deceased are not admissible against the defendant in a prosecution for murder, unless they are restricted to the act of killing and to the circumstances immediately attending it, and form a part of the *res gestæ*; and they must relate to facts, and not to mere matters of opinion or belief. Accordingly, where the defendant was charged with the death of decedent, caused by an attempt to produce an abortion upon her by the use of instruments or drugs, used or administered either by himself or some one else, *held* that her dying declarations as follows: "He is the cause of my death. Oh, those horrible instruments! Laws. [defendant] is the cause of my death,—he is my murderer. They abused me terribly," were improperly admitted.

Appeal from Jefferson District Court.—HON. H. C. TRAVERSE, Judge.

FILED, MAY 8, 1890.

THE indictment returned against the defendant is in two counts, the charging part of each being as follows: "The said Lawson J. Baldwin, on or about the

The State v. Baldwin.

twenty-eighth day of June, in the year of our Lord one thousand, eight hundred and eighty-five, in the county aforesaid, in and upon the body of one Mattie Rodabaugh, then and there being, wilfully, feloniously, premeditatedly, and with malice aforethought, did commit an assault with some instruments to the grand jury unknown, then and there held in the hands of the said Lawson J. Baldwin; and then and there said Lawson J. Baldwin did wilfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, thrust into the body and puncture and lacerate the womb and private parts of said Mattie Rodabaugh, then and there and thereby wilfully, feloniously, deliberately, premeditatedly, and of his malice aforethought, inflicting upon the body, womb and private parts of the said Mattie Rodabaugh, who was then and there a pregnant woman, mortal wounds, the number of which is to the grand jurors unknown, of which mortal wounds the said Mattie Rodabaugh, in Van Buren county, Iowa, on the eighth day of July, A. D. 1885, then and there did die. And the grand jurors aforesaid further aver and charge that the said defendant, Lawson J. Baldwin, at said time and place, and in the manner and by the means aforesaid, thrust into the body, womb and private parts of the said Mattie Rodabaugh said unknown instruments, with intent to produce a miscarriage of said Mattie Rodabaugh, the said miscarriage not being necessary to save the life of said Mattie Rodabaugh, contrary to and in violation of the law.

Second count. The said Lawson J. Baldwin, on or about the twenty-eighth day of June, in the year of our Lord one thousand, eight hundred and eighty-five, in the county aforesaid, in and upon the body of one Mattie Rodabaugh, a pregnant woman, then and there being, wilfully, deliberately, feloniously, premeditatedly, and with malice aforethought, did commit an assault, and then and there the said Lawson J. Baldwin did wilfully, deliberately, premeditatedly, and of his malice aforethought, and with the intent to produce the

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miscarriage of said Mattie Rodabaugh, administer and cause to be taken by said Mattie Rodabaugh certain drugs, substances, and medicines, to the grand jurors unknown, the same not being necessary to save the life of the said Mattie Rodabaugh, then and there being, and thereby wilfully, deliberately, premeditatedly, and of his malice aforethought, causing the said Mattie Rodabaugh, by means of said drugs, substances and medicines, to sicken and languishingly live, and on the eighth day of July, A. D. 1885, in Van Buren county, state of Iowa, to die, contrary to and in violation of law." The defendant having pleaded not guilty, the case was tried to a jury, and a verdict of "guilty of murder in the second degree" returned. Defendant moved for a new trial, and in arrest of judgment, which motions were overruled, and judgment entered on the verdict; to all of which the defendant excepted, and from which he appeals.

M. A. McCoid and W. A. Work, for appellant.

John Y. Stone, Attorney General, and *J. S. McKemey*, Special Prosecutor, for appellee.

GIVEN, J.—I. Our attention is first directed to the overruling of the defendant's motion in arrest of judgment. The grounds of his motion are that the indictment is void for duplicity, "in that it charged the offense in two inconsistent groups of facts;" that the indictment charges murder in the first degree, and the defendant was put upon trial thereunder for murder in the second degree; that the offense charged, as disclosed in the evidence, is one of necessity before the fact, and the indictment does not disclose any party with whom defendant is charged to have associated in the commission of the offense, and because on the whole record no legal judgment can be pronounced. "The indictment must charge but one offense, but it may be charged in different forms to meet the testimony." Code, sec. 4300. There is but one offense

1. MURDER: in producing abortion: indictment: two counts.

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charged in this indictment, the murder of Mattie Rodabaugh. In the first count it is charged to have been committed with some instrument to the grand jurors unknown, and in the second by administering and causing to be taken certain drugs, substances and medicines, to the grand jurors unknown.

We do not think that either count charges murder in the first degree, as neither charges an intent to take life. *State v. Gillick*, 7 Iowa, 312; *State v. Johnson*, 8 Iowa, 525. We think the indictment charges murder in the second degree, and, therefore, the defendant was rightly put upon trial for that offense.

If the indictment did charge murder in the first degree, the state would certainly have the right to waive a trial as to that degree, and claim a conviction for any lesser degree embraced in the charge. Such a case would differ materially from those referred to, wherein the party was put upon trial for a higher degree than that charged.

There is a view of the testimony, and probably the most tangible one, that would make the defendant guilty as an accessory before the fact, if guilty at all. Code, section 4314, is as follows: "The distinction between an accessory before the fact and a principal is abrogated, and all persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense, or aid and abet its commission, though not present, must hereafter be indicted, tried and punished as principals." It follows from this provision of the statute that there was no variance between the charge in the indictment and the testimony. We discover no reason in the record why a legal judgment could not be pronounced, and, therefore, conclude that there was no error in overruling the defendant's motion in arrest of judgment.

II. On the trial the court admitted, over defendant's objections, testimony as to statements made by

2. —: —;
—: first or
second degree

3. —: indict-
ment for first
degree: trial
for second.

4. —: acces-
sory before
the fact: in-
dictment:
evidence.

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Mattie Rodabaugh, deceased, as her dying declarations. The grounds of defendant's objections were that it was not shown that deceased was conscious of her danger, and had given up all hopes of recovery at the time of making the statements; that she was not conscious and sane at the time; and that the statements are not declarations of admissible facts. "The rule is well settled that dying declarations, to show the fact itself and the person by whom the mortal injury was inflicted, can only be given in evidence when they are made under a sense of impending death. * * * It must appear that they were made by the person injured in the full belief that he should not recover. * * * It must satisfactorily appear that, at the time of making them, the deceased was conscious of his danger, and had given up all hopes of recovery. * * * It is not necessary to prove by expressions of the deceased that he is apprehensive of immediate death, if it appears that he does not expect to survive the injury." *State v. Nash*, 7 Iowa, 378; 6 Amer. & Eng. Cyclop. Law, "Dying Declarations," and cases cited therein. The circumstances under which the declarations were made are to be shown to the judge; it being his province, and not

5. —: dying
declarations:
admissibility:
question for
court. that of the jury, to determine whether they are admissible. The courts uniformly hold that the competency of such testimony is to be determined by the judge, in view of

the surrounding and attending circumstances. *State v. Elliott*, 45 Iowa, 487. Deceased became ill at the house of Aaron Culbertson, in Fairfield, from where she was taken, July 2, to her father's house some miles distant.

6. —: —:
—: con-
sciousness of
danger. Dr. Pitt Norris, who was called to attend her, pronounced her beyond the hope of recovery. She continued to grow worse until the time of her death, July 8. On the day the doctor was called she expressed to him a fear of dying, and wanted to know if he could do anything for her, and he said her symptoms were just as bad as they could be, but that he would do everything he could for her. He says: "I do not know whether it cheered her

up or not. I formed and expressed the opinion that she might die at any time, at the first and subsequent visits that day, and she heard me express it." On the day she was brought home, and repeatedly thereafter, she expressed to her father and others the belief that she was going to die, and on one or two occasions she expressed a desire to live. In view of her condition, what was said to her by her physician and others, and her own expressions, we think she was conscious of her danger, and had given up all hope of recovery from the time she was brought home.

III. Dying declarations are statements of material facts concerning the cause and circumstances of homicide, made by the victim under a solemn belief of impending death. They are restricted to the act of killing, and to the circumstances immediately attending it, and form a part of the *res gestæ*. When they relate to former and distinct transactions, and embrace facts or circumstances not immediately connected with the declarant's death, they are inadmissible. They are admissible only as to those things to which the deceased would have been competent to testify. They must relate to facts, and not mere matters of opinion or belief. 6 Amer. & Eng. Cyclop. Law; *State v. Clemons*, 51 Iowa, 274. There is no question but that the declarations relied upon were spoken with reference to the defendant. They are as follows: "He is the cause of my death. Oh, those horrible instruments! Laws. is the cause of my death, he is my murderer. They abused me terribly." We infer from the record that one of the theories of the prosecution, and probably the only one, was that defendant had gotten the deceased with child, and that he attempted to produce an abortion upon her by the use of instruments or drugs, or that he procured some one else to do so, and that death resulted. We also understand one theory of the defense to be that the deceased produced or attempted to produce an abortion upon herself that caused her death. We have seen that the

declarations are restricted to the act of killing, and to the circumstances immediately attending it, and that they must form a part of the *res gestæ*; that when they relate to former and distinct transactions, and embrace facts or circumstances not immediately relating or connected with the declarant's death, they are inadmissible. These declarations did not necessarily refer to any attempt to produce an abortion. They are as plainly referable to the former relations of the parties. If it be true that the defendant had gotten the deceased with child, then her declarations were such as she might naturally make in her extremity, about her seducer, without intending to charge him with any more than her seduction. The expression, "Oh, those horrible instruments!" may indicate that instruments were used, but in no wise charges the defendant with having used them or aided in their use. We have seen that dying declarations must relate to facts, and not to mere expressions of opinion or belief. It has been held that where a person dying from a gun-shot declares that "A. shot me. A. killed me. A. is my murderer,"—would be admissible as the statement of a fact because of the circumstances. To say under such circumstances, "A. is my murderer," would not be an expression of opinion with respect to the degree of the homicide, but a statement of the fact that A. had inflicted the mortal wound. Not so, however, with these declarations. They cannot be considered as stating as a fact that defendant had anything to do with attempting to or producing an abortion. "The rule that dying declarations should point distinctly to the cause of death, and to the circumstances producing and attending it, is one that should not be relaxed. Declarations at the best are uncertain evidence, liable to be misunderstood, imperfectly remembered, and incorrectly stated. As to dying declarations there can be no cross-examination. The condition of the declarant in his extremity is often unfavorable to clear recollection, and to the giving of a full and complete account of all the particulars which it might be

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important to know. Hence all vague and indefinite expressions, all language that does not distinctly point to the cause of death and its attending circumstances, but requires to be aided by inference or supposition in order to establish facts tending to criminate the repondent, should be held inadmissible." *State v. Center*, 35 Vt. 378. Our conclusion is that the court erred in admitting these declarations, and that such ruling was prejudicial to the defendant. As for this reason the judgment of the district court must be reversed, we need not further notice the errors assigned, as those not considered will not arise in a retrial.

REVERSED.

79	722
109	308

KILLMER V. WUCHNER *et al.*

1. **Partition: TENANTS IN COMMON: ALLOWANCE FOR IMPROVEMENTS.** Plaintiff owned an undivided one-third of a tract of land in fee, and a life-estate in the whole, and defendants owned the other two-thirds in fee, subject to the life-estate. Plaintiff procured what purported to be a guardian's deed of defendants' interests, but it was of no effect; yet he believed it to be valid and relied upon it, and believing that he was the sole owner of the land, which was in a wild state, he took possession of it, made improvements equal to the value of the land, and continued in the undisturbed and unchallenged possession of it for twenty years, when he learned of the defect in his title, and brought this action for partition against the defendants. Actual partition could not be made, and a sale was necessary. *Held* that in determining plaintiffs' share of the proceeds the court properly allowed him the value of the improvements. (See opinion for citations.)
2. **The Same: CHOICE OF REMEDIES: EQUITY.** A court of equity having in such case acquired jurisdiction of the cause, it was competent to afford all the relief which equity demanded, and it was not necessary for plaintiff to resort to a court of law to recover the value of his improvements under the occupying-claimant act. (See *Green Bay Lumber Co. v. Ireland*, 77 Iowa, 636.)

Appeal from Keokuk District Court.—HON. DAVID RYAN, Judge.

FILED, MAY 8, 1890.

Killmer v. Wuchner.

ACTION in equity for the partition of real estate. The district court found that the premises involved in the action could not be partitioned, and decreed a sale thereof, and a division of the proceeds. The defendants, John J. and George G. Wuchner, appeal.

Mackey & Stockman, for appellants.

C. G. Johnston, for appellee.

ROBINSON, J.—The title to the land in question was considered and determined in *Killmer v. Wuchner*, 74 Iowa, 360. This action was brought for a partition of the land. Plaintiff asks that, in determining the respective interests of the parties to this action, the improvements upon the land be considered, and that an allowance therefor be duly made. Before this action was commenced plaintiff sold, and agreed in writing to convey, the premises in controversy to John Beinke; and he is made a party defendant. The appellants ask for the partition of the real estate, but insist that their interest is not affected by the improvements. The defendant Beinke admits the contract of purchase with plaintiff, and avers that it is an entirety, and that he does not desire to take only a part of the land. He also alleges that he has placed thereon improvements to the value of six hundred and seventy-five dollars, and asks that in case a sale is ordered the plaintiff's share of the proceeds thereof be paid into court until an adjustment is effected between himself and the plaintiff. To the answer of Beinke, appellants plead that the improvements for which he claims were made without their knowledge or consent, and with knowledge of their rights. The court below found that each appellant was the owner of an undivided four-twenty-fifths of the premises in controversy, including the improvements; subject to a life-estate of Dorothea Strohman, now held by Beinke, and that Beinke was the owner of

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an undivided seventeen-twenty-fifths of the premises, including improvements and the life-estate aforesaid. It was ordered that the premises be sold, and seventeen-twenty-fifths of the proceeds be paid to Beinke, and that the remainder be invested under the direction of the court; that the interest thereof be paid to Beinke during the life of Dorotha Strohman, and at her death that such remainder should be paid to appellants.

I. Appellants contend that the court erred in making an allowance against them for improvements

made by appellee. Numerous authorities are cited which hold, in effect, that a tenant for life cannot charge the inheritance or remainder estate with the cost or value of

1. PARTITION :
tenants in
common :
allowance
for improve-
ments.

improvements; and for the purposes of this case that may be conceded to be the general rule. The question we are required to determine is whether the facts of this case make it an exception to that rule. The land in controversy was purchased from the general government by the father of appellants, who died testate, and a non-resident of Iowa, in the year 1854. He devised to each of the appellants an undivided one-third of the land in question, subject to an estate in the mother. *Killmer v. Wuchner*, 74 Iowa, 360. By a decree of the Keokuk circuit court rendered December 31, 1886, from which the appellants in this case did not appeal, that estate was determined to be a life-estate in the shares of appellants, and an undivided one-third in fee simple. In the year 1862 the grantor of plaintiff obtained from the step-father of appellants, who were then minors, a deed which recited that the step-father was their guardian, and which purported to convey the land. It was insufficient as a conveyance, but the evidence satisfies us that it was received in good faith, and relied upon and treated as effectual to pass the title of appellants. In the year 1864, plaintiff's grantor acquired the interest devised to the mother, and in the year 1866 he executed to plaintiff a warranty deed for the entire tract of land. Valuable improvements were made upon

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it, and there is no doubt that plaintiff occupied and treated the premises as his own until the year 1884, when he sold them to Beinke without any knowledge of appellants' claims. When that sale was made an investigation of the title led to a discovery of the claims of appellants. At that time, one of them was about thirty-two years of age, and the other was two years younger, and neither had ever resided in Iowa. They did not know of their interest in the land, nor the improvements thereon, until about October, 1884. Beinke first learned of the defect in his title nine months after he had entered into the agreement of purchase, and, as we understand the record, after a large part, if not all, of the improvements had been made. Certainly, all of much value were made before there was any adjudication of his title. It is true, appellee could have ascertained the interests of appellants before making the improvements, but the improvements were made in good faith, and equal in value the worth of the land without them. When made, appellees were rightfully in possession of the land, and only did that which was proper to develop and make it productive. It was taken in a wild, uncultivated state, and by means of the improvements in question was fitted for residence, and made capable of yielding valuable profits. It cannot be partitioned, but must be sold, and the proceeds divided. Appellants have not been injured by the making of the improvements, and they have no just claim to any portion of their value. They will receive the same amount in value under the decree of the district court that they would have received had the improvements not been made, and with that they should be satisfied. Our conclusion is in harmony with the principles of equity, and is not without support of authorities. See *Thorn v. Thorn*, 14 Iowa, 55; *Carver v. Coffman*, 10 N. E. Rep. 568; *Cooter v. Dearborn*, 4 N. E. Rep. 393; *Ford v. Knapp*, 102 N. Y. 135; 6 N. E. Rep. 283; 2 Greenl. Ev., sec. 549, note 1; Freem. Co-tenancy, sec. 509.

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II. Other questions are discussed, but evidently not relied upon, by counsel for appellants. It is suggested that the relief demanded by plaintiff, and given to them by the district court, should have been sought in an action at law, under the occupying-claimant act. But a court of equity, having acquired jurisdiction of the case, has power to afford all proper equitable relief which is demanded. *Green Bay Lumber Co. v. Ireland*, 77 Iowa, 638. It is said that the questions involved in this case could have been adjudicated in the case of *Killmer v. Wuchner*, 74 Iowa, 359. That was an action to quiet title, and the relief demanded in this case was not made an issue in that. Appellants ask a partition in this case, and for general equitable relief, and cannot be heard to complain because their prayer is granted. We are of the opinion that the finding of the district court as to the shares of appellants is sustained by the evidence, and is fair to them. The decree of the district court is

AFFIRMED.

THE STATE V. FOSTER.

Criminal Law: CONTINUANCE ON COURT'S OWN MOTION. Defendant was charged with murder in the first degree. On the second day of the term he moved for a continuance to the next term for the purpose of procuring the testimony of absent witnesses. As the record then stood, the motion was properly overruled, and defendant excepted. Afterwards defendant moved for a postponement of the trial to a subsequent day of the term, and the motion was granted. The record upon this motion shows that there was then credible evidence before the court that the depositions of the absent witnesses had been taken and mailed to the place of trial, but, by no fault of defendant, they had failed to arrive; and that the witnesses had therein testified to facts inconsistent with defendant's guilt. On the day to which the trial had been postponed these depositions had not yet arrived, but no further continuance was then asked, and defendant was put upon his trial, found guilty, and sentenced to death. *Held* that it was the duty of the court, in the furtherance of justice, after learning the facts which the

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evidence tended to prove, and which were inconsistent with defendant's guilt, to continue the cause to the next term on its own motion, upon the application made therefor at the beginning of the term, though a postponement to a day in the same term was afterwards asked, granted and accepted.

Appeal from Taylor District Court.—HON. JOHN W. HARVEY, Judge.

FILED, MAY 8, 1890.

INDICTMENT for murder in the first degree. The indictment charges that the defendant, about the third day of November, 1887, murdered one Emmet Reed. It was returned on the twenty-eighth day of November, 1887, and the cause continued to the February term, 1888, when the indictment was tried and a verdict of guilty returned, fixing the degree of the crime as murder of the first degree; and, from a judgment imposing the death penalty, the defendant appeals.

L. T. McCoun and Phillips & Day, for appellant.

John Y. Stone, Attorney General, for the State.

GRANGER, J.—Emmet Reed owned two spans of mules and a span of mares, with three sets of harness, a wagon, tent and other camp equipage, with other articles of property, and had been engaged at work on a railroad in Iowa. The first days of October, 1887, with the property mentioned, and in company with the defendant, who was also a railroad laborer, he passed south through Taylor county, Iowa, bound for Missouri, for railroad work. On the second of November, 1887, Reed and the defendant returned from the south with the same teams and other property, and passed through Blockton, in Taylor county, in the afternoon. On the night of the second of November, they went into camp near Skinner's bridge, about two miles north of Blockton, on the bank of Platt river. On the morning of the third of November, between daylight and sunrise, the defendant was alone in the camp with the teams,

and hitched them to the wagon and drove away. He passed through Bedford in said county, and traveled west to Nebraska City. When Reed and defendant were at Blockton, on the second of November, the two spans of mules were hitched and driven in front of the wagon, and the span of mares was led behind. The lead span of mules was hitched by the aid of a short, linked chain, known as a "fifth chain," and in the wagon was a trunk belonging to Reed, and an open box with horseshoes and other articles of iron. On the sixth of November, in the river, about two rods from the camp occupied the night of November 2, was found, floating, Reed's trunk; and his body was soon after "fished up" from the bottom of the river, and around the neck was found the "fifth chain" spoken of. In the water were also found a lot of horseshoes, some wire and a "brass car box." Reed's skull, on the top, had been crushed in by a blow, apparently, from this car box, and was evidently fatal. From the camp fire to the river there was a trail indicating that the body had been drawn to and thrown into the river. In fact, the record is such that we may assume that Reed was killed near the camp fire by some one, and the body sunk in the river. The real point in controversy is who committed the crime.

The facts sought to be established by the defendant are substantially as follows: That prior to the second of November, there had been talk between him and Reed as to his purchase of the teams and outfit; that on the evening of the second of November, when in the camp described, they concluded their agreement, the purchase price to be six hundred and forty dollars, and the money was there paid; that, just before the completion of the transaction, two men by the names of Johnson and Parker, with a team, came to the camp from towards Blockton, and that the sale was completed and the money paid in their presence; that soon after the two men left the camp, returning towards Blockton, and about nine o'clock returned to the camp on their way north to Clearfield, some twelve miles distant, and

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that Reed then placed his trunk and the box with irons, including the "fifth chain" referred to, in their wagon, and left with them, after which he was not seen by the defendant; that in going to Clearfield they lost their way, and stopped with a farmer till morning, and, because of the sickness of one of their horses, they did not reach Clearfield till about noon; and that, about four o'clock on the afternoon of the third, Parker left by train for the west, and left Reed and Johnson at the depot.

To prove these facts the defendant desired the presence of Johnson, Parker and one Adams; and at the November term of the court, 1887, at which the indictment was returned, he made his application for a continuance because of the absence of Johnson and other witnesses whose presence he desired, and the application was granted. At the February term, on the second day, the defendant renewed his application for a continuance because of the absence of the testimony of Johnson, Parker and Adams, besides that of other witnesses, which the court refused; and the correctness of this refusal we are to consider.

The application for the continuance at the November term showed that, when Johnson and Parker were at the camp, Parker's name was unknown, but Johnson's was known; that defendant was acquainted with him, and that he was a permanent resident of Scott county, Iowa; and that defendant believed the man now known to be Parker was also a resident of said county. The record discloses that the application was made on the twenty-second of November for a continuance to the next term, which the court then refused, but continued the cause to the twenty-seventh inst., and ordered the sheriff of Taylor county to proceed in person to Scott county, to secure such witnesses. The sheriff returned the subpoena not served, and reported that he could not learn that such men had ever been in the county. In addition to the report of the sheriff, the counter-showing to the application at the November term showed that the sheriff and his deputies in Scott county had

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made diligent search in the county for Johnson, and could neither find Johnson nor any one who knew him. The affidavit of C. C. Campbell, auditor of Scott county, showed that he had resided in the county for thirty years, and had a large acquaintance with the people of the county, and had been a resident of different parts of the county, and did not know Johnson, and he had examined the records, and the name of Lewis T. Johnson did not appear on the "poll, assessor's or military books, or census returns of the county." Affidavits of some postmasters, and the city collector of Davenport, showing that no such man resided in the particular localities, also appear.

Referring, now, to the application for a continuance at the February term, of the ruling as to which very urgent complaint is made, and of the importance of which testimony, if in existence, there could be no question, the facts which defendant would seek to establish by Johnson and Parker will be understood. As to the witness Adams, defendant's claim was that he could show by him that he was on board the train, on the third of November, at Clearfield, going west; that he was acquainted with Parker; that he was on the platform of the car when Parker came aboard the train; that there were two men with him at the depot, whom he bade farewell, and called one of them Reed, but does not remember what he called the other; and that Adams traveled with Parker to Republican City, Nebraska. Soon after the November term of court the defendant was sent to the penitentiary at Ft. Madison, for safe-keeping, and remained there until a few days before the February term of court, at which he was tried. The duty of procuring evidence to be used in his behalf on the trial was left to his attorneys. It appears that Johnson has not since been found; and from the affidavit of L. C. McCoun, an attorney for defendant residing at Bedford, where the trial took place, it appears that he did not learn the names or location of Parker and Adams until the fifth or sixth days of February, 1888,

while he was in Phillipps county, Kansas. It then conclusively appears that prompt and vigorous steps were taken to secure a commission to take their depositions, and for that purpose a commission issued from the district court of Taylor county on the fourteenth or fifteenth day of February; the county attorney waiving time to aid the early taking of the testimony. The commission was directed to "any notary public in Phillipps county, Kansas," and was sent to one J. S. Barnes, at Phillippsburgh, in that county, a notary public, and was received by him on the sixteenth or seventeenth of February. The application for a continuance to the next term was filed on the twenty-first of February, it being the second day of the term, showing substantially the facts as stated as to the confinement of the defendant, the want of knowledge of the names and residence of the witnesses, the time the information was obtained, and of the issuance of the commission to take the depositions, and that they had not been returned, and also the facts to which the witnesses were expected to testify. The application was on the next day overruled, and the court proceeded to the trial of the indictment.

The following is taken from the record as presented by appellee's abstract :

"Comes now the defendant in this cause, and moves the court to postpone and adjourn further proceedings in said cause until Thursday, the first day of March, A. D. 1888. For cause of such motion, defendant states that the depositions of George Parker and John D. Adams were taken on the part of said defendant at Marvin, Kansas, and on the same day, to-wit, February 21, 1888, mailed to the clerk of this court, the same not having arrived; that therefore the same cannot be used at this time in behalf of said defendant in the trial now in progress. For further cause of this motion, see affidavit hereto attached, made a part hereof.

"D. E. WILLIAMSON,

"L. T. McCOUN,

"J. R. McCOUN,

"Attorneys for Defendant."

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The motion is supported by the affidavit of J. S. Barnes to the effect that he received the commission on the sixteenth or seventeenth of February, and, being unable to attend to the taking of the depositions, he passed the commission to one C. H. Edgcomb, a notary public in the same county, and that both Parker and Adams appeared before said Edgcomb on the twenty-first of February, 1888, and gave their depositions. Barnes was not present at the taking of the depositions; but, from his statements, he saw and read them, and he states their contents in substantial accord with what the affidavit for the continuance shows the witnesses would swear to. Barnes states, on information from the notary Edgcomb, and the postmaster at Marvin, Kansas, that the depositions were mailed to Bedford, Iowa, on the twenty-first of February, but too late for the train going east that day. Barnes appeared in open court for cross-examination; and there is nothing in his testimony to materially impair the statements of his affidavit, nor is the truth of his statements questioned in argument to us. In fact, on this branch of the case, it is only urged, on behalf of the state, that there was a want of diligence, an acquiescence in the action of the court postponing the case to February 27, and that the cause had been once before continued at the instance of defendant, which facts will be noticed hereafter.

Other affidavits were filed in support of the motion to postpone the trial, and among them one by the postmaster at Bedford, Iowa, stating that "it frequently happens that mail addressed to this office goes to Bedford, Indiana, and Bedford, Pennsylvania, and then returns here. The mail is sometimes delayed from three to ten days in reaching here after going to these points." The following then appears as the action of the court: "*The Court.* Mr. Reporter, let it appear that during the time this motion was heard, and this examination, that the jury was sent out by the court. *The Court.* I understand they are expecting a train in thirty or forty minutes for the north,—a mail train;

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and the court is disposed to wait before passing on this motion. *The Court.* The train for the north having arrived, and the depositions failing to come, the state agrees that the case may stand continued until half past one o'clock,—until the train from the south is due, which is 12:30; and the case will stand continued until half past one without passing on the motion, and at that time I will pass on the motion. At half past one, court was called. *The Court.* I understand that those depositions haven't come, Mr. McCoun. *McCoun.* I understand that the train hasn't come. *The Court.* There was a mail train came in from the north? *Answer.* Yes, sir. *Question.* And that those depositions didn't come? *The Court.* Mr. Reporter, I desire you to take down what I say in regard to passing on this motion, as it will be made a part of the record in this case. *McCoun.* I say, if we get this continuance, I think the court will have given us ample time, so far as the depositions are concerned, and we don't ask any further continuance for testimony. I have nothing in my mind now. I would not want to bind myself, and say nothing would arise. When the depositions arrive, we will be ready to go to work at any time. *The Court.* So far as the testimony is concerned? *McCoun.* Yes, sir. Here the case was continued until Thursday morning of this week; and at this time, Thursday morning, the depositions not having arrived, this case is resumed." The day following (March 2), the jury returned its verdict of murder of the first degree, affixing the death penalty, and on the sixth day of March judgment thereon was pronounced.

The peculiarities of the record have led us to make this extended statement, as from it we are to determine a question both delicate and important,—delicate in the sense that it involves a review of an exercise of discretion on the part of the district court; important in the sense that it involves the life of a human being. If we are to reverse the judgment, it must be on a state of facts never before presented to this court. The only

exception taken to the ruling of the court on a question of continuance was to the ruling on the third day of the term, in refusing a continuance to the next term. The application for a postponement on the twenty-seventh of February to March 1 was granted, and the record indicates that the defendant then thought it was all he could reasonably ask. A peculiarity of the case is this: With the condition of the record on February 23, we do not think the holding of the court erroneous. In the light of the record as then viewed, considering the application at the previous term, and the evident misstatements therein, the manner and piecemeal method of its presentation, which do not appear in our statement of the case, with other minor facts, there was much to discourage a belief in the sincerity of the effort to obtain the testimony. Later disclosures, through the affidavit of Barnes on February 27, leave little room for doubt that Parker and Adams were in Kansas, and their depositions taken. Certainly, Barnes is without conscience and an unblushing criminal at heart, if it is not true. If the depositions were taken, and true, it is morally and legally certain that the defendant is not guilty. His conviction was entirely on circumstantial evidence. The testimony, by the depositions in question, goes directly to the fact of the homicide. It is in no sense of technical significance. Hence, if the depositions are true, and the judgment is executed, the case is without even the palliation that he committed the act, though he might have avoided a record of guilt by the aid of legal refinements.

The case would be shorn of much of its difficulty, because of its legal bearings, if, after the facts were disclosed by the affidavit of Barnes, a continuance beyond the term had been asked, even if refused; for then we should have a case in which the district court acted upon the record as it is presented to us. Now we have a case in which, speaking alone of what was asked of the district court, we must approve its judgment as based upon the record at the time it acted; and we meet

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the query whether we may go beyond what appeared to be the facts on the twenty-third of February, and determine the validity of the court's action upon what were the actual facts as shown by the testimony afterwards presented? Assuming the affidavit of Barnes to be true, and we have the actual facts that the depositions had been taken and mailed to Bedford, Iowa, in time for use on the trial, and were lost without fault of the defendant. If the district court had been asked, on that state of facts, to continue the case, and had refused, its judgment would, of course, be reversed. Nor have we reason to think the district court would have refused it. It is also significant that in the motion for a new trial the district court is not given an opportunity to pass upon such a state of facts, unless it should do so on its own motion. In civil cases, where only private interests are involved, judgments often receive support from such omissions and conditions of the record. Should such a rule obtain in criminal cases, and particularly in one in which the execution of the judgment is the taking of a human life? Such a rule could result in good to no one, and the judgments of all men would condemn it. The public can have no interest in the execution of an innocent man. This judgment once executed, even partial reparation, if afterwards demanded by developments, cannot be made. We think the defendant should have the benefit of the testimony of Parker and Adams, if obtainable, and that there is no interest that should claim his execution merely as the result of the negligence of his attorneys, if they were negligent, in obtaining the testimony or in properly protecting the record. If the record was less conclusive as to the existence of the depositions or as to their having been taken, our views might be different. We attach much importance to this particular feature of the case, and to the nature of the judgment.

If the district court, after full developments, had on its own motion offered the continuance sought at the

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beginning of the term, its action would have been in harmony with a correct administration of the law, and what should have been done, though we know the practice to be unusual. The Code, section 4538, requires that in such case we must examine the record and render such judgment, and, if necessary, order a new trial. Believing that the district court should have permitted a trial at a subsequent term to enable the defendant to have the benefit of the testimony, we may now make an order that will effectuate such a purpose.

Having reached such a conclusion without reference to a paper found in the record entitled "Amendment to the original abstract," we now refer to it. We have not before referred to it, because of its doubtful propriety in the case. No question, however, has been made as to its authenticity; but it contains three affidavits, all of which appear to have been made after judgment was pronounced in the case, and two of them as late as March 12, 1889. The two are the affidavits of C. H. Edgcomb, before whom the depositions were taken, and one Frank Nixon,—the former stating that the depositions were taken before him, and properly mailed to Bedford, Iowa, on the twenty-first of February, 1888; the latter, that he was present, and saw the depositions subscribed by Parker and Adams, and saw them enclosed and mailed. The other is the affidavit of George Parker to the facts as claimed to have been stated in his deposition. Conceding that this additional abstract has no place in the record, it must operate to establish the justice of our holding that a new trial should be had.

We have examined the record, and think there are no other questions demanding our consideration. The judgment of the district court is reversed, and the case remanded for a new trial.

REVERSED AND REMANDED.

THE STATE V. MONTGOMERY.

79	737
92	488
79	737
110	650
79	737
128	667

1. **Forcible Defilement: INDICTMENT: DUPLICITY.** An indictment which charges that the defendant "did wilfully, unlawfully and feloniously take one S., unlawfully and against her will, and, by force and menace and duress, compelled her, the said S., to be defiled, and then and there laid hold of her, the said S., with his hands, and held her upon the ground, and did then and there force, ravish and have carnal knowledge of her, the said S., and in the manner and form aforesaid did then and there defile her," is good as an indictment for forcible defilement, under section 3862 of the Code, and is not vulnerable to the objection that it also charges the crime of rape.
2. ———: **EVIDENCE TO SUSTAIN VERDICT: CORROBORATION.** The evidence in this case considered (see opinion) and *held* sufficient to sustain a verdict of guilty of forcible defilement, as against the objection that the prosecutrix consented to all that was done. It was not necessary that she be corroborated in order to justify a verdict of guilty. (See *State v. Grossheim, ante*, p. 75.)
3. ———: **EVIDENCE AS TO BODY OF CRIME.** In such case a witness was properly permitted to testify that he examined the clothing worn by the prosecutrix at the time the offense was committed, and that he found certain stains thereon indicating that sexual intercourse had been attempted or accomplished. (*State v. Stowell*, 60 Iowa, 588, and *State v. Painter*, 50 Iowa, 319, distinguished.)

Appeal from Cedar District Court.—HON. J. H. PRESTON, Judge.

FILED, MAY 9, 1890.

THE defendant was convicted of the crime of forcible defilement, and adjudged to be imprisoned to the penitentiary at Anamosa, at hard labor, for the period of three years. From that judgment he appeals.

Wheeler & Moffitt, for appellant.

John Y. Stone, Attorney General, and *Robert G. Cousins*, for the State.

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ROBINSON, J.—The parts of the indictment necessary to an understanding of the questions presented for our determination are as follows: “The grand jury of the state of Iowa, within and for the county of Cedar, * * * in the name and by the authority of the state of Iowa, upon their oaths do aver, find and present that George Montgomery, at and within said county, on the thirteenth day of August, A. D. 1889, did wilfully, unlawfully and feloniously take one Sophia Wheelock, unlawfully and against her will, and, by force and menace and duress, compelled her, the said Sophia Wheelock, to be defiled, and then and there laid hold of her, the said Sophia Wheelock, with his hands, and held her upon the ground, and did then and there force, ravish and have carnal knowledge of her, the said Sophia Wheelock, in the manner and form aforesaid did then and there defile her, contrary to the statutes of Iowa.”

I. The appellant insists that the indictment is bad for duplicity, in that it charges defendant with the crimes of forcible defilement and rape. The two offenses are much alike when the person guilty of forcible defilement has carnal knowledge of the female. In such cases the difference is largely in the degree of force required to perpetrate the crime, and in the resistance thereto. A person is guilty of rape if he “ravish and carnally know any female of the age of thirteen years or more by force and against her will.” Code, sec. 3861. He is guilty of forcible defilement if he “take any woman unlawfully and against her will, and, by force, menace or duress, compel her * * * to be defiled.” Code, sec. 3862. In each case the act must be unlawful and against the will of the female. In case of rape, it must be accomplished by force, and in case of forcible defilement “by force, menace or duress.” The words “ravish and carnally know,” used to define “rape,” are not used to define “forcible defilement;” but to defile may mean “to pollute,” “to corrupt the chastity of,” “to debauch” or “to violate.”

1. **FORCIBLE**
defilement:
indictment:
duplicity.

The State v. Montgomery.

Webst. Dict. "Violate" and "force" are synonymous with "ravish." Code, sec. 3862. By referring to the indictment, we find words used which would be proper in charging the crime of rape, but they also express elements of the crime of forcible defilement, and to some extent describe the means by which it was accomplished in this case. The indictment, considered as an entirety, clearly shows an intent to charge the offense last named, and is not, therefore, vulnerable to the objection made.

II. The appellant asks a reversal of the judgment of the district court on the ground that the evidence was
2. —: evidence not sufficient to sustain the verdict. It
to sustain
verdict: cor- appears that appellant was a merchant
roboration. engaged in business at Big Rock; that, about two weeks before the commission of the offense charged, the prosecutrix called at his place of business to purchase a few articles of merchandise; that she had never seen defendant before, was sixteen years of age, uneducated, without knowledge of men, and of a mental development much less than the average of girls of her age; that she was accompanied by a brother, who was induced by defendant to leave the store; that the defendant was alone with the prosecutrix, and indulged in improper conduct towards her, but failed to have sexual intercourse; that he told her he would visit her at her home; that about two weeks later he rode to her father's place in a creamery wagon, and while the mother of the prosecutrix was engaged in conversation with the driver of the wagon, in front of the house, the defendant induced prosecutrix to go with him through a strip of corn to some stacks twenty-four rods back of the house; that he pulled her through the corn-field, having hold of one hand; that she tried to pull away from him, but made no outcry, although within hearing of her mother and others; that when the stacks were reached he drew her between them, pushed her down, and by using some force had carnal knowledge of her; that she made no outcry and offered but little resistance; that her mother

The State v. Montgomery.

reached the stacks and discovered the sexual intercourse before it was completed; that she upbraided defendant, and charged him with improper conduct, in the presence of the driver of the wagon, in consequence of which the latter refused to allow him to ride further. Appellant contends that the evidence shows that whatever he did was done with the consent of the prosecutrix; that she knew of his conduct in his place of business; knew that he was intending to visit her; and that she agreed to all that was done. He denies having had sexual intercourse with her, but is contradicted by so great a weight of evidence that there is no doubt that his denial is false. The testimony of the prosecutrix as to her resistance and the force used by defendant to accomplish his purpose is not corroborated, but such corroboration was not required. See *State v. Grossheim*, ante, p. 75. The jury were authorized to believe her statement as to her resistance and the force used by defendant, and that he accomplished his purpose against her will. In our opinion, the evidence is ample to sustain the verdict. See *Pollard v. State*, 2 Iowa, 570.

III. A witness was permitted to testify that he examined the clothing worn by the prosecutrix at the time the offense was committed and found certain stains thereon. Appellant complains of the admission of that testimony. It is true the stains were not very fully described; but the evidence was admitted for the purpose of showing that sexual intercourse had been attempted or accomplished, and the stains were understood to be of that character. If they were not, the fact could have been shown on cross-examination. The evidence was not offered to show that defendant was the one who committed the crime in question, but as tending to show that the crime had in fact been committed; and for that purpose, we think, it was competent. The cases of *State v. Stowell*, 60 Iowa, 538, and *State v. Painter*, 50 Iowa, 319, are not in conflict with the conclusion we have reached.

3. —: evidence
as to body of
crime.

The State v. Toombs.

IV.. Objection is made to some of the instructions given to the jury. In addition to what we have already said, it is only necessary to say that we have examined the instructions with care, and do not find them erroneous as applied to the facts in this case. The judgment of the district court is **AFFIRMED.**

THE STATE V. TOOMBS.

1. **Houses of Ill Fame: INDICTMENT: STATUTE FOLLOWED.** An indictment which charges that the defendant kept a house of ill fame, resorted to by divers persons for the purposes of prostitution or lewdness, is not bad for duplicity on account of the use of the word "or" instead of "and." The indictment being in the language of the statute in that particular, it is not subject to the objection raised as to its form. (See citations in opinion.)
2. ———: **EVIDENCE: COMPETENCY.** In such case it was proper to permit a witness, who was an omnibus-driver, and who had often taken women to defendant's house, to testify that one woman whom he took there said to him that if "he saw any boys that wanted to come over to fetch them over." Such testimony was competent to show the character of the women who made the house a stopping place, and was admissible, though the conversation was not had in defendant's presence.
3. ———: **EVIDENCE TO SUPPORT VERDICT.** Where the evidence showed that defendant's house was known as a house of ill fame, and that lewd women and licentious men made it a place of resort, the evidence was sufficient to support a verdict of guilty of keeping a house of ill fame.
4. ———: **LEWDNESS: DEFINITION.** In a prosecution for keeping a house of ill fame, the court defined lewdness to be an "irregular indulgence of the animal desires." *Held* that, while the definition was inaccurate, it was not misleading, as the jury would easily understand from the nature of the case that the court meant unlawful commerce between the sexes.
5. **Criminal Practice: MISSTATEMENT OF LAW BY COUNSEL.** Counsel, in a prosecution for keeping a house of ill fame, in argument to the jury, said: "The rule is that if defendant has evidence at his command, and fails to use it, it weighs against him," and under this rule he drew the inference that defendant was guilty; because, if he was not, he could have proved the contrary by his wife and son, whom he failed to put upon the stand. *Held* that, though the rule as stated was wrong (which, however, is not decided), yet a misapprehension and misstatement of the law by counsel in argument is no ground for a reversal.

79	741
102	697
103	725
79	741
111	77
79	741
115	177

The State v. Toombs.

Appeal from Benton District Court.—HON. G. M. GILCHRIST, Judge.

FILED, MAY 9, 1890.

DEFENDANT was indicted and tried for keeping a house of ill fame, and from a verdict of guilty, and judgment thereon, he appeals.

W. C. Connell, for appellant.

John Y. Stone, Attorney General, and *J. T. Christy*, County Attorney, for the State.

ROTHROCK, C. J.—I. It is claimed by counsel for appellant that the court erred in overruling a motion to quash the indictment. The charging part of the indictment is as follows: "That the said defendant, Daniel Toombs, did on or about the first day of May, 1886, and on divers other days between that day and the finding of this indictment, in the county of Benton, and state of Iowa, unlawfully and wilfully keep a house of ill fame, resorted to by divers persons, whose names are unknown to this grand jury, for the purpose of prostitution or lewdness, contrary to and in violation of law." The ground of the motion was that the indictment charged two offenses, because it is stated therein that the defendant kept a house of ill fame, resorted to for the purposes of "prostitution or lewdness." The objection is that the word "and" should have been used between the words "prostitution" and "lewdness." The objection appears to us to be without merit. The crime charged in the indictment is keeping a house of ill fame, which is a single offense, and the statement of what was carried on or permitted at the house is but a statement of what acts may constitute the crime. Moreover, the indictment is in the very language of the statute. This is sufficient. An indictment charging

1. Houses of ill fame: indictment: statute followed.

The State v. Toombs.

an offense in the language of the statute is not open to objection on account of its form. *State v. Smith*, 46 Iowa, 670; *State v. Curran*, 51 Iowa, 112; *State v. Brewer*, 53 Iowa, 735.

II. The defendant objected and excepted to certain testimony given in behalf of the state by a witness named W. W. Brewer. He was the driver

2. —: evidence: competency. of an omnibus, and testified that he had frequently taken women to the defendant's house, in daytime and at night. He was asked the following question: "Do you remember any conversation you had with one there last winter?" The question was objected to unless the conversation with the woman was in the presence of the defendant. The objection was overruled, and the witness answered as follows: "There was one said if I saw any boys that wanted to come over to fetch them over. That is all." It is claimed that this testimony was hearsay, and, not being in defendant's presence, he was not bound by it, and that any man might be ruined by designing women making such statements. We think the evidence was competent. It was a most material fact tending to sustain the indictment. It showed that the woman making the statement was a prostitute; and that she entered the defendant's house and gave out an invitation or request to the witness to bring men to the house. The character of the women who made the house a stopping place could be shown by their conversation not in the presence of the defendant.

III. It is further urged that the verdict is not supported by the evidence. We cannot reverse the judgment on this ground. It is sufficiently shown that the defendant was the keeper of the house, and that it had the reputation of being a house of ill fame. The evidence of the bad reputation of the house is abundant to establish the fact that it was known as a house of ill fame, and it is sufficiently shown that lewd women made it a place of resort, and that men of licentious repute visited the

3. —: evidence to support verdict.

The State v. Toombs.

house. In short, the verdict appears to us to be well supported by evidence.

IV. The third paragraph of the charge given by the court to the jury is as follows: "3. You must

also determine whether said house, if you find it is one of ill fame, was resorted to for the purpose of prostitution or lewdness.

Prostitution is the common lewdness of a woman for gain, or the offering of her person to indiscriminate intercourse with men, while lewdness is irregular indulgence of the animal desires. In determining the question whether said house was resorted to, you are authorized to consider, as shown in the evidence, the character of the women, if any, resorting or repairing to said house, the conduct of men visiting said house, and times men went to said house, the length of their stay, and any other facts or circumstances in evidence tending to show why women resorted to said house, if you find any did resort to it." It is objected that this instruction gives an incorrect definition of the word "lewdness;" that irregular indulgence in animal desires is not necessarily unlawful. It is true that the word "unlawful," instead of "irregular," would have been a more accurate definition. But there was no possible prejudice to the defendant by reason of this technical inaccuracy. The whole subject of the investigation on the trial was whether the plaintiff was the keeper of a house where unlawful commerce between the sexes was carried on and permitted. The jury could not have considered any other question.

V. Lastly, it is urged that one of the counsel on the part of the state, in making the closing argument to the jury, wrongfully, and to the prejudice

of the defendant, made use of the following language: "The rule is that if defendant has testimony at his command, and fails to

use it, it weighs against him. Now, there are no persons in the wide world that know as well as Dan Toombs' wife and son whether there were women kept

4. —: lewd-
ness: defini-
tion.

5. CRIMINAL
practice: mis-
statement of
law by coun-
sel.

The State v. Rainsbarger.

there in the last three years. Why did he not put them on the stand? No, gentlemen, it is true that he kept them there right along. If it were not so, Dan would have put his wife and son on the witness stand and shown it was not so." It is claimed that the rule of law stated by counsel for the state is not correct. It may be that it was not. That question we do not determine. The court made no ruling on the question. We do not think that the language should be regarded as prejudicial misconduct of counsel. In the argument of a cause to a jury counsel ought not to be prevented from drawing inferences from the evidence, and commenting upon the conduct of the parties. Some latitude must be allowed in this respect. If it is misconduct for counsel to claim that a certain proposition is law, and it transpires that he is wrong, and that the law is otherwise, very few verdicts would be allowed to stand. The judgment of the district court will be

AFFIRMED.

THE STATE V. RAINSBARGER.

1. **Assault with Intent to Kill: EVIDENCE TO CONVICT.** Defendant was indicted for an assault alleged to have been made upon one S., by shooting at him with a revolver, with intent to kill him. The evidence (see opinion) as to the number of shots fired by defendant, and as to whether he intended to injure S., was conflicting, and, as the trial court refused to set aside a verdict of guilty as not being sustained by the evidence, this court cannot interfere.
2. **Criminal Law: INSTRUCTIONS: PROOF BEYOND REASONABLE DOUBT.** Where the court in one instruction has made it plain that the state must prove the facts constituting defendant's guilt beyond a reasonable doubt, it is not prejudicial error to begin other instructions thus: "If you find from the evidence that defendant," etc., without each time saying, "If you find beyond a reasonable doubt," etc.
3. **———: IMPEACHMENT OF DEFENDANT: INSTRUCTION AS TO EVIDENCE.** Where defendant in a criminal case was a witness in his own behalf, and there was evidence tending to impeach him, the court rightly instructed that the impeaching evidence should

The State v. Rainsbarger.

only be considered to the extent of determining the weight and credit, if any, to be given to defendant's testimony as a witness in his own behalf; and it was not necessary to add that the jury should not allow it to influence them in any manner against the defendant as a party to the suit.

4. ———: INSTRUCTIONS: WHEN PROPERLY REFUSED. An instruction asked is rightly refused when the same thought is clearly expressed in the instructions given.

Appeal from Hardin District Court.—HON. D. D. MIRACLE, Judge.

FILED, MAY 9, 1890.

DEFENDANT was indicted by the grand jury of Hardin county for the crime of assault with intent to commit murder, alleged to have been committed as follows: "The said Joseph Rainsbarger, on the twenty-seventh day of February, 1886, in the county aforesaid, in and upon one Christian Smith, did commit an assault with a deadly weapon, being a revolver loaded with powder and ball, and held in the hands of the said Joseph Rainsbarger, then and there did wilfully, feloniously, and with malice aforethought, shoot off and discharge the contents of said revolver at and against the said Christian Smith, with specific intent, then and there, him, the said Christian Smith, to kill and murder, contrary to the law." Defendant having pleaded not guilty, the case was submitted to a jury, and a verdict returned finding the defendant guilty of an assault with intent to inflict great bodily injury. Defendant's motion for a new trial was overruled, and judgment entered on the verdict, to all of which the defendant excepted, and from which judgment he appeals.

Albrook & Hardin, for appellant.

H. L. Huff and *John Y. Stone*, Attorney General,
for the State.

GIVEN, J.—I. Counsel for appellant urge in argument that the evidence is insufficient to sustain the verdict, and that the court erred in giving and refusing certain instructions. The testimony shows without conflict that about five o'clock p. m., of the day named, the defendant was on horseback, in the road in front of Christian Smith's house, and that he then and there discharged a revolver once or twice. That at that time Smith was squatted down alongside of his corn-crib, his back towards the gate opening into the highway, engaged in picking up corn from the ground. Smith testifies that on hearing the first shot he made a couple of steps towards the gate, and saw the defendant sitting on his horse at about the center of the gate, and that defendant then fired a second shot at him; that he heard the first ball whiz past his head; that after firing a second shot the defendant rode a little ways south, and then returned, and hitched his horse at the gate, came into the yard, and used profane, abusive and threatening language towards him (Smith); that at the time the second shot was fired his (Smith's) dog was in the yard, between him and the defendant. Smith is corroborated by several witnesses as to the number of shots fired, and what took place after the second shot. Defendant testified that he did not see Smith at the time he fired the revolver; that he shot at the dog, and that when Smith jumped up and hallooed he told him that he was shooting at the dog; that he had no ill feeling towards Smith; that the dog was south of the gate when he shot at him; that he only shot once; that he did not stop at the gate, did not go into Smith's yard, and did not swear at him, nor call him hard names. John Rainsbarger, brother of the defendant, testified that he was in a field thirty rods distant; heard one shot; saw Smith's dog there; that defendant was ten yards south of the gate when he shot; that the dog was running and barking at the horse; that he did not hear a second shot; nor see defendant stop

1. ASSAULT with
intent to kill:
evidence to
convict.

at the gate. There is considerable testimony as to how much of the side of the corn-crib could be seen from different points alongside of the gate. There was also some testimony tending to show that about one year previous to this Smith's wife had accused the defendant of injuring an animal belonging to Smith.

This is a sufficient statement of the testimony to show that there was a conflict as to how many shots the defendant fired, and whether he intended to injure Smith. In *State v. Elliott*, 15 Iowa, 79, the court says: "And, while we recognize the duty of the court to interfere with an unjust verdict, it should nevertheless be well satisfied, when the testimony is conflicting, of its insufficiency to convince the judgment, reason and conscience of the triers, before setting aside the conclusion arrived at, as it must be presumed, after the requisite patient thought and attention; and especially is this so when the court below has refused to disturb such verdict." We are clearly of the opinion that the judgment in this case should not be reversed on the grounds of insufficient evidence.

II. After instructing the jury fully and explicitly in the second paragraph of the charge as to the degree of proof required to convict, the court says in the fourteenth paragraph: "If you find from the evidence that the defendant," etc. Appellant complains because the jury were not again instructed that they must find beyond a reasonable doubt. Taking the instructions together, there was no room for misapprehension or mistake as to what was meant in the fourteenth paragraph; it was manifest that the finding therein referred to must be beyond reasonable doubt. In the fifteenth paragraph the court says: "If you find from the evidence that the defendant shot at the witness' dog, and not at the witness, such shooting would not render the defendant guilty of any degree of the offenses charged in the indictment." Appellant complains that the jury were not thereby instructed that, if there was a reasonable

2. CRIMINAL law:
instructions:
proof beyond
reasonable
doubt.

The State v. Rainsbarger.

doubt as to which of the two was shot at, they should acquit. It is true, as stated, that the principal point in dispute was whether the defendant shot at the dog or at the man, and equally true that, to convict, the jury must find that he shot at the man. No doubt could have existed in the minds of the jury on this subject, after considering the second instruction, in connection with the one under notice.

III. The defendant being examined as a witness in his own behalf, the state introduced evidence as to his moral character, and character for truth and veracity, together with similar evidence as to other witnesses. After instructing the jury as to this class of testimony, the court said, respecting defendant, as in the case of the other witnesses sought to be impeached: "This evidence should only be regarded by you to the extent of determining the weight and credit, if any, to be given to his testimony as a witness in his own behalf." Appellant complains that the court did not restrict the application of this evidence to the weight to be given to the defendant's testimony, and did not instruct the jury that it should not be allowed to influence them in any manner against the defendant as a party to the suit. We think the court very clearly restricted its application to the defendant as a witness.

Appellant complains of the refusal of the court to give the following instruction: "If there is a reasonable doubt in your minds, from all the evidence in the case, as to whether the defendant shot at Christian Smith, or at the dog, then you should acquit." This thought is clearly embraced in the instructions given. We have examined the record with respect to errors assigned, whether argued or not, and our conclusion upon the whole record is that the judgment of the district court should be

AFFIRMED.

8. —: impeachment of defendant: instruction as to evidence.

4. —: instructions: when properly refused.

THE STATE V. SEVERSON.

Criminal Law : JUDGMENT OF GUILTY OF ONE OF SEVERAL COUNTS : INFERENCE AS TO THE OTHERS. Defendant was tried before a justice of the peace upon an information charging four distinct offenses in as many counts. The justice found him guilty on the first count, but made no finding of record upon the other counts. *Held* that he was, by inference, acquitted on the other counts, and that, upon an appeal by him to the district court, he could not be again legally tried upon any but the first count.

Appeal from Winneshiek District Court.—HON. L. E. FELLOWS, Judge.

FILED, MAY 9, 1890.

THE defendant was arrested and taken before a justice of the peace on an information for selling intoxicating liquor. The information contained four counts, charging separate offenses. Upon the trial before the justice the following appears to be his finding: "I find defendant guilty as charged in count one of the information." No specific finding is made as to the other three counts, and a fine of fifty dollars was imposed. The defendant appealed to the district court. In the district court the question was submitted as to the defendant's guilt on the four counts of the information; and the jury specifically found the defendant not guilty on the first, second and third counts, and guilty on the fourth count. The defendant moved the court in arrest of judgment, and for a new trial, on the ground that the defendant had been acquitted before the justice on the fourth count of the information, and that he could not again be tried for the same offense, which motions were overruled, and a fine and costs imposed, from which the defendant appeals.

GRANGER, J.—The case is before us on a transcript, and we are without brief or argument. The record suggests only the one question: Was the finding of the

The State v. Severson.

justice an acquittal as to the fourth count of the information? The cause was submitted to the justice on the testimony, and the record exempts none of the counts from the purposes of the trial. The counts of the information are numbered, and they specify separate offenses. The court finds the defendant guilty on one count only, and names the count "Count 1." The defendant, being put upon trial as to all the counts, was entitled to a finding as to all, and we think the legal inference of the finding and record is that the defendant was not guilty as to the counts 2, 3 and 4. The case of *State v. Matting*, 11 Iowa, 239, is quite distinguishable. In that case there were five counts in the information, and on the trial before the justice there was a general finding "as guilty as charged in the information." The inference from such a finding would be guilty on all the counts. But, if there had been a finding of guilt as to counts 1 and 2, no such inference could follow; but, on the contrary, an inference of acquittal would follow as to the counts not specified. The specification of guilt as to one or more counts operates to exclude the same finding as to others. In that case the court imposed a fine of twenty dollars, which was the penalty for but one offense, and the language of the opinion indicates that the justice made a "general finding" on all the counts, and imposed a fine for a "general offense." If the judgment was general on the information, the appeal therefrom would bring up the entire case for retrial, for there was no record of acquittal as to any count, either in terms or by legal inference. In this case before the justice there was a finding of guilty as to "count 1." No judgment of conviction could have been upon any other count, and there could be no appeal as to an offense not prosecuted to judgment. The appeal is from the judgment. Code, sec. 4697. As a legal inference, the defendant stood acquitted, before the justice, of the information, except count 1. In the district court he was acquitted of count 1, and hence he stands acquitted of the entire information. The judgment is

REVERSED.

WALKER V. FREELove.

1. **Pleading: WAIVER OF ERRORS.** After defendant had been ruled to answer in thirty days, he filed a motion for a more specific statement of the cause of action, and plaintiff moved to strike this motion from the files, but at the next term he confessed defendant's motion and filed an amendment to his petition, making a more specific statement. *Held* that by so doing he waived all objections to proceedings whose object was to require him to do that which he at last voluntarily did.
2. **Judgment on Default: SETTING ASIDE.** Where a judgment upon default was rendered upon an amended petition, of which defendant had no notice, claiming to recover largely in excess of the original petition, and which was not entered upon the court calendars, and was filed only a short time before the default was entered, and at the very last hour of the term, such judgment was properly set aside upon motion made at the next term, under section 8154, paragraph 8, of the Code.

Appeal from Marshall District Court.—HON. S. M. WEAVER, Judge.

FILED, MAY 10, 1890.

ACTION to recover attorney's fees. There was a judgment upon a default for want of an answer, which, upon motion of defendant, was set aside. Plaintiff appeals.

Thomas F. Bradford and *Warren Walker*, for appellant.

James Allison and *Henderson & Hargrave*, for appellee.

BECK, J.—I. On the first day of October, 1887, plaintiff filed his petition in this case, claiming of defendant one thousand dollars for fees and expenses arising on account of services rendered by plaintiff as a lawyer in defending defendant against a prosecution by the state. On the

1. **PLEADING:**
waiver of
errors.

eleventh day of February, 1888, defendant appeared, and was allowed thirty days in which to answer, and the case was continued. On the twentieth of February defendant filed a motion for leave to file an attached motion for a more specific statement of plaintiff's cause of action. On the same day plaintiff filed a motion to strike these papers from the files. On the twenty-third day of April, 1888, which we understand was at the next term, plaintiff confessed the objection raised by defendant's motions just referred to, and filed an amendment to his petition, making a more specific statement of the cause of action, and claiming to recover thirty-five hundred dollars instead of one thousand dollars, as prayed for in the original petition; and on the same day a default was entered against defendant, and a judgment rendered thereon for thirty-five hundred dollars, the sum claimed in the amended petition. On the seventeenth day of August, in vacation, the defendant moved to set aside the default and judgment on the ground of irregularities, shown by affidavits accompanying the motion, consisting in demanding and granting the default on the day when the amended petition was filed, and at the very last hour of the term, which adjourned on that day. The case had not been entered in the calendars of the term, and counsel for defendant had no notice that the case would be called up, and had cause to believe, for various reasons stated, that no further business would be transacted at the term, in which they were interested, and for that reason they had left the court house. It is shown that defendant, in good faith, intended to defend the action, and did not fail to do so through negligence. The affidavits filed in support of defendant's motion tend to support the grounds upon which it is based, and justify the decision of the court setting aside the judgment.

II. Counsel for plaintiff assigns the following errors upon the record. They are set out here for the reason that they present all the grounds of objection

Walker v. Freelove.

urged by plaintiff, and enable us more clearly to answer them: "1. The court erred in sustaining defendant's motion for leave to file motion for more specific statement in petition after an order had been made by agreement requiring defendant to answer. 2. The court erred in allowing defendant to file motion for more specific statement, after an order had been made by agreement requiring defendant to answer in thirty days. 3. That the court erred in not entering of record the order striking the motion for more specific statement from the files. 4. That the court erred in allowing defendant to withdraw motion to strike amended petition, and to file answer and counter-affidavit. 5. That the court erred in sustaining the motion to set aside judgment and default, for the reasons stated in the objections thereto. 6. That the court erred in overruling the objections filed by plaintiff to the motion to set aside judgment and default."

III. The first four assignments of error are readily disposed of by the consideration that they direct objections to the very thing which defendants ask by their motion should be done, namely, a more specific statement of the cause of action, and which plaintiff, by his confession of the error pointed out by the motion, undertook to do, and by the amendment filed actually did. Now, surely, plaintiff, after confessing his error in the petition, and curing it by amendment, cannot raise any complaint based upon the facts and action of the court stated in these assignments of errors, all of which show that plaintiff was permitted or required to do that which he voluntarily performed.

IV The last two assignments of error relate to the action of the court in setting aside the judgment. It is first insisted that, as the motion is made
2. JUDGMENT on default: setting aside. under Code, section 2871, it should have been made at the term the judgment was rendered; and, as it was made at a subsequent term, it was erroneously sustained. But the motion was made under Code, section 3154, paragraph 3. Surely, it was

Walker v. Freelove.

an irregularity to permit a judgment by default to be rendered upon an amended petition at the time and under the circumstances above related. Such irregularity may be corrected by setting aside the judgment upon motion. Code, sec. 3157. In our opinion, the showing made upon the motion sufficiently supports the order of the court setting aside the judgment. The court below had before it, more clearly and fully than we can have, the facts and circumstances involved in the case. Surely, it will not be claimed that justice will permit a judgment to stand which was rendered by default upon an amended petition of which defendant had no notice, claiming to recover largely in excess of the original petition, and which was not entered on the court calendars, and was filed a short time before the default was entered, and at the very last hour of the term. The court below was authorized upon the evidence submitted in the case to find these facts, or, at least, it cannot be said that such a finding is so without the support of the evidence as to require us to interfere. It is our opinion that the judgment of the district court ought to be

AFFIRMED.

SUPPLEMENT.

[The following opinion was retained on a petition for rehearing and did not come into my hands in time for insertion in its chronological order.—REPORTER.]

McCONNELL V. THE IOWA MUTUAL AID ASSOCIATION *et al.*

1. **Life Insurance: MUTUAL ASSESSMENT PLAN: NECESSITY OF ATTACHING APPLICATION TO POLICY.** Laws of 1880, chapter 211, section 2, requiring applications and representations upon which policies are issued to be attached to or indorsed on the policies, and providing that an omission so to do does not invalidate the policy, but precludes the company from pleading or proving the falsity of the representations, applies to mutual life insurance companies on the assessment plan, although neither that nor any similar provision is found in Laws of 1886, chapter 65, which regulates mutual benefit associations. (Compare *Cook v. Federal Life Ass'n*, 74 Iowa, 746.)
2. ———: **ACTION ON POLICY: LIMITATION BY TERMS OF POLICY.** The policy sued on in this case required proofs of death to be filed within sixty days, and action on the policy to be commenced within six months, after the death of the assured, and it provided that payment should be made within forty-five days after the filing of such proofs. *Held* that, even if defendant's denial of liability immediately after the death of the assured was a waiver of such proofs, a right of action did not accrue until the expiration of the forty-five days, and that an action commenced within six months after that time was not too late.

Appeal from Wapello District Court.—HON. H. C. TRAVERSE, Judge.

FILED, OCTOBER 2, 1889.

(757)

79	757
81	136
79	757
97	324
97	327
79	757
103	311
103	428
79	757
113	725
79	757
115	489
79	757
131	56
131	57
79	757
137	502

McConnell v. The Iowa Mut. Aid Ass'n.

ACTION in chancery to compel an assessment upon the members of the defendant corporation, and the collection and payment thereof, to the amount of two thousand dollars, upon a certificate or policy issued to the husband of plaintiff in his lifetime, obligating the defendant corporation to make such assessment, collection and payment upon his death. A demurrer to defendants' answer was sustained, and defendants, standing upon certain counts of their answer, refused to further plead, and appealed from the judgment on the demurrer.

McNett & Tisdale, for appellants.

E. L. Burton and *Payne & Eichelberger*, for appellee.

BECK, J.—I. The petition alleges that plaintiff's husband, in his lifetime, became a member of the Iowa Mutual Aid Association, a corporation organized under the laws of Iowa for the purpose of insuring the lives of its members upon the mutual assessment plan, upon the terms and conditions prescribed by the articles of incorporation and by-laws of the association, and the policies or certificates issued by it, or contracts entered into with the members insured; that such a certificate was issued to plaintiff's husband, or such a contract was entered into with him by the defendant corporation; that defendant did not attach to the certificate or policy, nor endorse thereon, the application or representations made by the assured, plaintiff's husband, which, by its terms, are made a part of the policy; and that the assured subsequently died, and was at the time of his death a member of the defendant association. The petition further alleges that immediately upon the death of her husband she gave notice thereof to the association, and within sixty days caused proofs of the death of the assured to be filed with the secretary of the association, which complied with the requirements of the policy;

McConnell v. The Iowa Mut. Aid Ass'n.

that she made demand about one month before suit was brought that an assessment be made, as required by the policy, for payment of the sum due thereon, and was then first informed by the association that it would make none, and that it denied liability on the policy; thus waiving, as it is alleged, proofs of loss. The certificate, or policy, is made a part of the petition, and shows that it was issued upon the consideration of the payment in cash of ten dollars, and the further annual payment of \$2.50, and the prompt payment of benefit assessments to be legally levied by the association, which became bound thereby to make assessments upon the members of the association upon the death of the assured, and therefrom to pay to plaintiff the proceeds thereof, not exceeding two thousand dollars, in forty-five days after the filing of proofs of death of assured, which, with notice, shall be made within sixty days after death.

Certain conditions were indorsed on the policy and made a part thereof. One was in this language: "No action of any kind shall be maintained upon this certificate as against the association for any cause connected therewith, unless satisfactory proofs are furnished the association within sixty days, nor unless such action is commenced within six months after the happening of the death on account of which the action is brought; any statute of limitation or law to the contrary notwithstanding."

The answer, in the fifth count, alleges that the assured, in an application required by the articles of association and by-laws of the defendant incorporation, represented and warranted that he was in good health, and such warranty became a condition of the policy, when in fact he was not in good health, but was affected with consumption, an incurable disease of which he afterwards died. It is alleged in the sixth count of the answer that the action is barred by plaintiff's failure to perform the condition of the policy requiring proof of death to be furnished within sixty days, and the action

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to be commenced within six months thereafter. Other allegations of the answer assailed by the demurrer need not be recited, as defendant does not stand upon its pleadings presenting them, but rests upon the questions raised by the action of the court in sustaining the demurrer to the fifth and sixth counts of the answer.

II. The demurrer to the fifth count of the answer was based upon the ground that it does not show that the application or representations of the assured upon which the policy was issued was indorsed on or attached to the policy, as required by section 2, chapter 211, Acts of the Eighteenth General Assembly.

1. Life insurance: mutual assessment plan: necessity of attaching application to policy.

Miller's Code (1888) p. 398. This statute requires applications and representations upon which policies are issued to be attached to or indorsed thereon, and provides that omission so to do does not invalidate the policy, but the insurance company is precluded from pleading or proving the falsity of the representations. It is applicable to policies and contracts for life insurance. *Cook v. Life Association*, 74 Iowa, 746. It is held in that case that the language of the act is so broad and comprehensive that it applies to and covers all kinds of insurance and policies.

Counsel for defendant think that inasmuch as the provision is not incorporated into chapter 65, Acts Twenty-first General Assembly, which regulates mutual benefit associations, and no similar provision is found therein, it ought to be held that it is superseded, and is not now applicable to the class of insurance to which the policy in the case before us belongs.

But there is no conflict between the two acts, and the provision in question is in no respect obnoxious to the subsequent legislation.

But counsel for defendant insist that the system of insurance to which the policy involved in this suit belongs is "purely benevolent," and, therefore, ought not to be subject to the legislation applicable to other classes of insurance. We think the "benevolence" in

McConnell v. The Iowa Mut. Aid Ass'n.

the case is purchased for, at least, a fair, if not a liberal, consideration, and rests upon a contract which must be regarded and enforced by the law as all other contracts. It will not do to recognize a rule which requires courts to consider the purposes of contracts, or to be guided in their interpretation and the application of remedies for enforcing them, by the benefits conferred upon the contracting parties, and the benevolent purposes they had in view when they assumed the obligations of the contract.

III. The demurrer to the sixth count of defendant's answer is on the ground that the non-performance of the conditions therein pleaded, requiring proofs of loss to be filed within sixty days after the death of assured, and the action to recover on the policy to be commenced in six months after the same event, does not operate as a bar to this action.

2. —: action
on policy:
limitation by
terms of
policy.

It is a familiar and just rule recognized by the courts, that a bar created by statute or by the contract, to an action for a breach of its conditions by reason of the lapse of time, will not commence to run until the right of action accrues; that is, the plaintiff must have the full time given by the statute or contract after his right of action arises, in which to commence his suit.

The sixth count of the answer alleges that immediately after the death of assured plaintiff repudiated its obligation to pay anything upon the policy.

It is insisted that such denial of defendant's liability dispensed with the condition requiring notice and proofs of loss of the death of the assured, which must be given before suit can be brought. Without so holding, this position may be assumed for the purposes of the case. But, as we shall see, the action cannot be commenced, under other conditions of the policy, until the expiration of forty-five days after liability on the policy has fully accrued. It will be remembered that, by a condition of the policy above stated, the association did not become liable to pay the sum insured

McConnell v. The Iowa Mut. Aid Ass'n.

under the policy until the expiration of forty-five days after the filing of proofs of death of the assured. Now, if the repudiation of liability dispensed with proof of death, as claimed by defendants, and, as is assumed above, the amount of the policy became payable at the expiration of forty-five days after the death of assured, and not before, of course, no action could have been commenced until that time.

It cannot be said that defendant's denial of liability is such a repudiation of the contract as to authorize an action to be commenced prior to the time it is authorized by the terms of the policy fixing the maturity of plaintiff's claim and defendant's liability.

We reach the conclusion that plaintiff could not have commenced his action sooner than forty-five days after the death of the assured. The views we have expressed leading to this conclusion are supported by the following decisions of this court: *Ellis v. Insurance Co.*, 64 Iowa, 507; *Miller v. Insurance Co.*, 65 Iowa, 704; *Eggleston v. Insurance Co.*, 65 Iowa, 308; *Quinn v. Insurance Co.*, 71 Iowa, 615.

The allegations and admissions of the answer show that a suit on the policy could not have been commenced according to the terms of the policy until forty-five days after the death of the assured. The limitation of the action fixed by the policy is six months after the cause of action accrued. The pleadings show that the suit was commenced within six months after the expiration of the forty-five days within which plaintiff's claim matured, and that the action is not therefore barred.

The conclusion we have announced disposes of the questions arising in the case. The judgment of the district court is

AFFIRMED.

APPENDIX.

NOTES OF CASES NOT OTHERWISE REPORTED.

THE STATE V. SAMPSON.

Appeal from Polk District Court.—HON. W. H. McHENRY, Judge.

FILED, JANUARY 27, 1890.

ON indictment for keeping a gambling house.

W. S. Sickmon, for appellant.

John Y. Stone, Attorney General, for appellee.

GIVEN, J.—This cause is submitted upon a partial transcript alone. All that is shown by the transcript is that the appellant was indicted for the crime of keeping a gambling house, and that judgment was entered against him adjudging that he pay a fine of seventy-five dollars together with the costs, and that he be imprisoned in the jail of the county for a period of twenty-two days, "unless said fine be sooner paid or secured, as provided by law."

Our attention has not been called to any errors in this proceeding, and we fail to discover any upon an examination of the transcript. The judgment of the district court is, therefore,

AFFIRMED.

THE STATE V. CONKLING.

Appeal: NO NOTICE SHOWN: DISMISSAL.

Appeal from Polk District Court.—HON. W. H. McHENRY, Judge.

FILED, JANUARY 29, 1890.

DEFENDANT was convicted of the crime of larceny in a store building in the daytime.

No argument for either party.

ROBINSON, J.—This cause is submitted on a transcript of the indictment, record of judgment and notice of appeal. We discover no error in the record, but as it is not shown that the notice of appeal was ever served, the case is

DISMISSED

ROBERTSON V. WARD & CO.

No Appeal Shown : DISMISSAL.

Appeal from Polk District Court.—HON. MARCUS KAVANAGH, JR., Judge.

FILED, JANUARY 31, 1890.

Cole, McVey & Clark, for appellants.

Baylies & Baylies, for appellee.

GRANGER, J.—The abstract in this case contains no statement whatever as to an appeal, and there is nothing to indicate that an appeal has been taken. Appellee does not appear and so far as the record discloses is not advised of the pendency of the action in this court. The case as to this court is

DISMISSED

THE STATE V. MURPHY.

Appeal from Polk District Court.—HON. W. H. McHENRY, Judge.

FILED, FEBRUARY 5, 1890.

No arguments on file.

GRANGER, J.—This proceeding is upon an information charging the keeping of intoxicating liquors with intent to sell the same in violation of law. The transcript is but a partial one, and not certified. The cause appears to have been in the district court, and a judgment imposed; and from the conditions of the record before us we are unable to find that there was error in the district court, and its judgment is

AFFIRMED.

THE STATE V. RAY.

Appeal from Page District Court.—HON. A. B. THORNELL, Judge.

FILED, FEBRUARY 6, 1890.

THE defendant and one William Jennings were jointly indicted for the crime of burglary. Separate trials were granted, and defendant was convicted and adjudged to be imprisoned in the penitentiary at Ft. Madison for the term of two and one-half years. He appeals.

W. P. Ferguson, for appellant.

John Y. Stone, Attorney General and *T. R. Stockton*, County Attorney, for the State.

ROBINSON, J.—This case and the case of *State v. Jennings*, ante, p. 513, were submitted on the same record and arguments, and involve substantially the same questions. Following the decision in that case, the judgment of the district court is **AFFIRMED.**

THE STATE V. FLUSCHE.

Liquor Nuisance : VERDICT WITHOUT EVIDENCE.

Appeal from Shelby District Court.—HON. GEORGE CARSON, Judge.

FILED, FEBRUARY 8, 1890.

THE defendant was indicted and convicted of keeping a nuisance, by maintaining a place for the unlawful sale of intoxicating liquors and now appeals to this court.

J. W. DeSilva and *H. W. Byers*, for appellant.

John Y. Stone, Attorney General, for the State.

BECK, J.—The defendant is a physician and pharmacist. It was admitted on the trial that during the time covered by the indictment his diploma as a physician and certificate as a pharmacist were in full force, and that during the same time he held a valid permit from the board of supervisors for the sale of intoxicating liquors for lawful purposes.

The evidence of each witness who testifies to sales is to the effect that they were made in good faith for medical purposes, and none were shown to have been made for purposes forbidden by law. There is not one word of evidence tending to establish unlawful sales. It may therefore be said that the verdict wholly lacked the support of the evidence. On this ground the district court should have set aside the verdict, and for the failure to do so upon defendant's motion the judgment is reversed. Other questions in the case need not be considered.

REVERSED.

THE STATE V. SIMPSON.

Appeal from Polk District Court.—HON. W. H. MCHENRY, Judge.

FILED, FEBRUARY 8, 1890.

THE defendant was indicted, tried and convicted upon a charge of keeping a nuisance by the unlawful sale of intoxicating liquors, and he appeals.

W. S. Sickmon, for appellant.

John Y. Stone, Attorney General, for the State.

ROTHROCK, C. J.—The appeal was submitted to this court upon a transcript of the indictment and the judgment of the court. There is nothing in the record which shows that there was any error in the rulings and judgment of the court. The judgment will therefore be
AFFIRMED.

THE STATE V. HARRIS.

Appeal from Polk District Court.—HON. W. H. MCHENRY, Judge.

FILED, FEBRUARY 8, 1890.

THE defendant was convicted upon a charge of keeping a nuisance by the unlawful sale of intoxicating liquors, and he appeals.

W. S. Sickmon, for appellant.

John Y. Stone, Attorney General, for the State.

ROTHROCK, C. J.—The appeal was submitted to this court upon a transcript of the indictment and the judgment of the court. There is nothing in these records which shows that there was any error in the rulings and judgment of the district court. The judgment will therefore be
AFFIRMED.

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1. DEFECTS CURED BY STATUTE. A defective acknowledgment of a power of attorney, executed in 1867, and duly recorded in this state prior to the taking effect of section 1967 of the Code, is cured by that section. (See *Brinton v. Seevers*, 12 Iowa, 389.) *Collins v. Valleau*, 627.
2. OF PARTNERSHIP MORTGAGE. See Chattel Mortgages, 4.

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ANIMALS

1. BULL AT LARGE : PERSONAL INJURY : NEGLIGENCE : EVIDENCE. In an action for personal injuries inflicted by defendant's bull while running at large, evidence to the effect that defendant frequently permitted the bull to run at large in the road was properly admitted as bearing on the question whether the bull was at large with defendant's permission at the time of the injuries ; and evidence as to the character and general reputation of the bull as being vicious, and as to what had been told to plaintiff on that subject, was properly admitted as bearing on the question of plaintiff's contributory negligence. *Meier v. Shrunk*, 17.
2. ——— : ——— : CONTRIBUTORY NEGLIGENCE. Whether it was negligence for plaintiff in such case to strike the bull with his cane before he was attacked was a question for the jury, after considering all the circumstances of the case. *Id.*

3. ——— : ——— : INSTRUCTION. In such case the court properly instructed that plaintiff was not required to prove that the highway where the bull was at large was legally established, but that it was sufficient to show that the road was open to the public and used by the public as a highway. *Id.*
4. ——— : ——— : DEFENDANT'S KNOWLEDGE. In such case plaintiff was not required to prove that defendant knew the bull to be vicious. (See McClain's Code, sec. 2255.) *Id.*
5. ——— : ——— : PLEADING : INSTRUCTIONS. In such case, where plaintiff alleged that by reason of his injuries he "became sick, sore and lame, and so continued for a long time, and is not yet fully recovered therefrom, during all of which time the plaintiff thereby suffered great pain, and was thereby prevented from performing his lawful business," *held* that the allegations were sufficient to justify the court in submitting to the jury the question as to damages for loss of time, as well as the question as to damages for future disability. *Id.*
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APPEALS.

To Supreme Court.

1. JURISDICTION : CERTIFICATE : QUESTIONS OF LAW ONLY. Section 8173 of the Code, giving this court jurisdiction of appeals involving less than one hundred dollars, only when questions of law are certified by the trial judge, contemplates that each question certified shall present a question of law, in intelligible language, distinct from other questions of law or fact: and the certification of questions of fact, or of questions involving questions of fact, does not give jurisdiction. So, in this case, where seven questions were certified, and the first two related to the weight of the evidence, and the third and fourth to the correctness of instructions given and refused, and the fifth to the sufficiency of the evidence to sustain the verdict, and the sixth and seventh to the question whether the verdict was in accord with the law and the instructions, *held* that they all involved a consideration of the evidence, *i. e.*, questions of fact, and that the certificate did not confer jurisdiction. (See opinion for citations.) *Bensley v. Chicago & N. W. Ry. Co.*, 266.
2. PROCEEDINGS FOR CONTEMPT : JURISDICTION. Under section 3499 of the Code, providing that "no appeal lies from an order to punish for a contempt, but the proceedings may, in a proper case, be taken to a higher court for revision by *certiorari*," *held* that this court has no jurisdiction, on appeal, to review an order discharging the defendant in the proceeding for contempt in violating an injunction, though issued under the statutes for the suppression of intemperance; but it would *seem* that it has jurisdiction, upon *certiorari*, to review the order made in such a case, whether it be for the punishment or the discharge of the defendant, when such review is demanded either by public or private interest. (Compare *Congregational Church v. City of Muscatine*, 2 Iowa, 69, and *Lindsay v. District Court*, 75 Iowa, 509.) *Currier v. Moeller*, 316.
3. FROM JUDGMENT ON INTERVENTION : WAIVER. In an action on a bond there was judgment against defendants, from which they did not appeal, but the issues arising upon a petition of intervention were in the express language of the judgment reserved for subsequent proceedings. *Held* that, though these issues might have been determined in the main case, yet, since they were so expressly reserved, defendants did not waive their right to appeal from the judgment on such issues by failing to appeal from the judgment in the main case. *Richards v. Osceola Bank*, 707.

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2. **PAYMENT OF JUDGMENT BY ASSIGNMENT TO INDORSER.** See Judgments, 3

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. **EFFECT UPON UNEXECUTED CONTRACT WITH MUTUAL OBLIGATIONS.** Defendant entered into a contract with Y. Bros. to sell them a certain number of machines, for which payment was to be made by the promissory notes of Y. Bros. as the machines were delivered; and in consideration thereof Y. Bros. were to have the exclusive sale of the machines in certain territory, and they were to canvass the territory for the sale of the machines, and to take cash or notes of the purchasers in payment, and to turn the cash and notes so taken over to defendant,—the cash to be indorsed as payment on the notes of Y. Bros., and the notes to be held as collateral security. After some of the machines had been sold by Y. Bros. and delivered to the purchasers under the contract, Y. Bros. became insolvent, and made an assignment for the benefit of their creditors, and defendant notified the assignee that it would regard the contract as ended, and would furnish no more machines thereunder, and afterwards it entered the same territory and sold the machines therein. This action is by the assignee to recover for a breach of the contract. *Held—*
 - (1) That sections 2082 to 2087 of the Code, making all contracts assignable, refer only to the rights, in possession or action, of the holder by virtue thereof, and not to his obligations thereunder; and that, therefore, Y. Bros. could not, by reason of anything contained in said sections, by an assignment, compel the defendant to accept the assignee as their debtor instead of themselves.
 - (2) That when Y. Bros. became insolvent, the defendant was no longer bound to furnish them the goods contracted for on credit, but had a right to declare the contract at an end and that they could not, by the assignment, confer any greater right upon the assignee.

- (3) It would *seem* (but it is not decided) that if the assignee had demanded the rest of the machines and offered to pay the cash for them, defendant would have been obliged to furnish them, and to comply with the contract in other respects. *Rappleye v. Racine Seeder Co.*, 220.

2. **PERSONAL JUDGMENT AGAINST ASSIGNEE: WHAT IS NOT.** In an action against the assignee of Y. Bros. for the benefit of their creditors, the judgment was that the claim "be and is hereby established as a claim against the estate of Y. Bros., and against the said R. as their assignee." *Held* not to be a personal judgment against R., but only an establishment of the claim. *Id.*

See VENDORS AND PURCHASERS, 11.

ATTACHMENTS.

1. **OF LAND: JUDGMENT: VOID SALE: LIEN: DURATION.** Where land was attached prior to the execution of a mortgage upon it, and after the execution of the mortgage judgment was rendered against the attached property, and the land was sold thereunder, but the sale was void, *held* that the judgment was not affected by the sale, but continued to be a lien on the land,—and the first lien,—until ten years after its date, after which time it was a lien no longer (Code, sec. 2882), and the mortgage, being still in force, became the first lien. *Bull v. Gilbert*, 547.
2. **PRIORITY OF.** See Chattel Mortgages, 9.

BAIL BONDS.

ACTION ON. See Criminal Law, 18-21.

BANKRUPTCY.

ENFORCING LIEN AGAINST BANKRUPT'S PROPERTY: LIMITATION. Section 5057 of the Revised Statutes of the United States, providing that no suit shall be maintained in any court between the assignee in bankruptcy and the person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee, does not apply to an action between a vendor to the bankrupt and a judgment creditor, involving the priority of their liens, both of which antedated the assignment, and where the property in question had, by order of court, been conveyed by the assignee to the vendor in satisfaction of his demand. *Devin v. Eagleson*, 269.

BANKS AND BANKING.

1. **BOND TO SECURE DEPOSIT OF COUNTY FUNDS: SURETIES: COLLATERALS: RIGHTS OF VICE-PRESIDENT AND COUNTY TREASURER.** The defendant bank received of the plaintiff, county treasurer, the funds of the county on deposit, and the bank executed its bond to secure the same, under section 912 of the Code, with C., the vice-president of the bank, and another, as sureties. C. was authorized to pay debts of the bank and to give security for the same, and it was he who executed and gave, in the name of the bank, the bond above named. *Held*—
- (1) That C. was authorized to turn over to plaintiff, as treasurer, notes belonging to the bank, as collateral security for the deposit secured by the bond.
 - (2) That the treasurer was authorized to receive and hold such collaterals in addition to the bond.
 - (3) That the sureties on the bond had a right to demand that these collaterals should be exhausted for the payment of the deposit before their property should be taken on execution therefor. *Richards v. Osceola Bank*, 707.

2. **RECEIVERS: RIGHTS OF DEPOSITORS: SURETIES: LIENS.** Where a bank owning real estate has passed into the hands of a receiver, and a county treasurer who has deposited county funds in the bank, and has taken a bond with sureties to secure the deposit (Code, sec. 912), afterwards procures judgment against the bank for the deposit, such judgment is not a lien upon the real estate of the bank, so as to entitle the sureties on the bond to have such real estate exhausted in payment of the judgment before they are made liable on execution; but such real estate is assets in the hands of the receiver for the benefit of all depositors ratably. (See Code, sec. 1572.) *Id.*

3. **FRAUDULENT BANKING.** See Criminal Law, 32-41.

BASTARDY.

PATERNITY OF CHILD: EVIDENCE. In a bastardy proceeding, where it was shown that the prosecutrix was much in the company of a man other than the defendant shortly before the child was begotten, and that she had had a marriage engagement with such other person, which had for some time been abandoned, evidence that she and such other person had, some eight years before, been together at a hotel, locked up in a room for several hours, was properly admissible as bearing upon the probable character of their associations near the time when the child was begotten, and thus upon the question of the paternity of the child. *State v. Borie*, 605.

BILLS AND NOTES.

See **NEGOTIABLE INSTRUMENTS; PROMISSORY NOTES.**

BILLS OF EXCEPTIONS.

See **PRACTICE AND PROCEDURE IN SUPREME COURT**, 8, 9.

BILLS OF LADING.

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BONDS.

1. **BAIL BONDS.** See Criminal Law, 18-21.
2. **DELIVERY BONDS.** See Replevin, 1.
3. **TREASURER'S BOND.** See Counties, 2.

BRIDGES.

DEFECTIVE APPROACHES: LIABILITY OF COUNTY: INSTRUCTIONS. In an action against a county for personal injuries received upon an approach to a bridge, and caused by alleged negligence in its construction, it is for the jury to determine not only whether the accident occurred upon the approach to the bridge, but also whether the approach in question was a part of the bridge, or only a part of the highway leading thereto; and an instruction given in this case (see opinion) which submitted the first question to the jury is held to be erroneous, because it did not submit the second one also. (Compare *Moreland v. Mitchell County*, 40 Iowa, 894, and *Nims v. Boone County*, 66 Iowa, 272, and 68 Iowa, 642.) *Newcomb v. Montgomery County*, 487.

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CERTIORARI.

See APPEALS, 2; TAX SALE AND DEED, 4.

CHANGE OF VENUE.

See CRIMINAL LAW, 27.

CHATTEL MORTGAGES.

1. DESCRIPTION OF PROPERTY. The rule is well established that if, from the description contained in a chattel mortgage, the mind is directed to evidence whereby it may ascertain the precise thing conveyed, the record of the instrument is notice to third persons; otherwise it is not. (See *Everett v. Brown*, 64 Iowa, 442.) Under this rule, *held* that the following description was sufficient: "The following described cattle now kept by us on our farms" in a certain township (giving the names of the cattle): "Eighteen head of two-year-old steers, of various colors. The foregoing represents the names of said cattle as registered in the American Short-Horn Herd Book. Also one span of heavy, dark bay mules, also kept on said premises." *City Bank of Boone v. Ratkey*, 216.
2. IDENTITY OF PROPERTY: EVIDENCE. Where there is some evidence as to the identity of mortgaged chattels, this court will not disturb the finding of the jury on that point. *Id.*

3. **NOTICE : PROOF OF RECORDING.** In an action to recover property by virtue of a chattel mortgage, it is necessary for the plaintiff to prove actual notice of the mortgage, or constructive notice by the recording thereof. In the absence of any evidence tending to prove such notice, it was error to submit the question of notice to the jury, and a verdict for plaintiff should have been set aside. *Id.*
4. **OF PARTNERSHIP PROPERTY : FORM, EXECUTION AND ACKNOWLEDGMENT OF.** F. J. was a member of the firm of A. T. J. & Son, the members of which were M. E. J., K. J. and himself. To secure a firm debt, he executed a chattel mortgage on the firm property, beginning, "I, A. T. J. & Son Co., per F. J., a member of the firm," and the mortgagor was afterwards referred to in the instrument thus : "I, the said A. T. J. & Co.," and "A. T. J. & Co., mortgagor." It was signed by F. J. and M. E. J., and K. J. consented to its execution, and it was acknowledged by "F. J., a member of the firm of A. T. J. & Son Co." *Held—*
 - (1) That it was not invalid as a firm mortgage because the abbreviation "Co." was several times added to the true name of the firm, since that could have misled no one.
 - (2) That F. J. had authority to bind the firm by a chattel mortgage made by himself to secure a firm debt, and that the signature of M. E. J. thereto was surplusage, and did not invalidate it.
 - (3) That, at all events, no one but the other members of the firm, or those claiming under them, could question his authority to bind the firm by the mortgage.
 - (4) That the acknowledgment by "F. J., a member of the firm of A. T. J. Son Co.," was sufficient. *Citizens Nat. Bank v. Johnson*, 290.
5. **——— : BY TWO OF THREE MEMBERS OF FIRM : VALIDITY.** A chattel mortgage, made to secure a firm debt, by two of three members of the firm, the other consenting thereto, but being unknown to the mortgagee as a partner, is valid as between the parties, though it does not purport to be a partnership mortgage : and is also valid as to subsequent attaching creditors who have notice of the facts. *Id.*
6. **VALIDITY : DESCRIPTION.** A mortgage of horses and vehicles which describes the horses by color, age and weight, and the vehicles by name, with the addition, "Said property kept in our stable in the city of Des Moines," is sufficient as to description ; and so is a mortgage of "two landau hacks now in our possession at our barn" at a certain designated place in said city. *Id.*
7. **MORTGAGOR'S OWNERSHIP : EVIDENCE.** Where S. mortgaged goods which he had in his possession under a contract giving him the right to purchase them from plaintiff at a certain price, but it was not shown that he ever exercised that right, and plaintiff testified that he still owned the goods, *held* that the evidence did not establish the right of the mortgagee as against the plaintiff. *Bray v. Flickinger*, 818.
8. **——— : EVIDENCE OF MORTGAGEE'S BELIEF.** Defendant having been permitted to testify that he believed his mortgagor owned the mortgaged chattels, it was immaterial what his reasons for so thinking were. *Id.*

9. **APPLICATION OF PROCEEDS : CONDITIONAL ACCEPTANCE OF ORDER.** Defendants had a chattel mortgage on cattle which had been sold, and the proceeds were in bank to the credit of the mortgagor, but were held by the bank upon request of defendants, and also upon request of the purchasers of the cattle, who directed the bank to pay out the money in such manner as would protect them against the mortgage. The mortgagor gave plaintiff an order on defendants for a sum of money "for feeding twenty head of steers * * * upon which you now have a chattel mortgage, and charge the same to my account." Defendants accepted the order "so far as we have money in our hands after our claims or notes are satisfied in full out of the proceeds" of the mortgaged cattle. S., another creditor of the mortgagor, commenced suit and garnished the bank, but the suit was dismissed upon an understanding between him, the mortgagor and defendants that his claim should be paid after defendants' mortgage. The payment of the mortgage and the claim of S. left only enough of the proceeds to pay a part of plaintiff's order, and, in an action by him against defendants on the acceptance, *held*—

- (1) That the mortgage on the cattle did not give defendants a lien upon the proceeds. (See *Waters v. Bank*, 65 Iowa, 234.)
- (2) That, in view of the fact that the proceeds were not in defendants' control, their acceptance of the order must be regarded only as an agreement to apply the excess of the fund, so far as they could legally control it, in payment of the order. (See *County of Des Moines v. Hinckley*, 62 Iowa, 637.)
- (3) That, as against S.'s attachment, the defendants could not control the fund for the payment of their mortgage.
- (4) That defendants' agreement that S. should be paid next after satisfying the mortgage did not diminish the amount that plaintiff would have been entitled to upon his order, and did not make defendants liable to him for the unpaid balance thereof. *Nordby v. Clough*, 428.

CITIES AND TOWNS.

1. **POWERS : DISPOSITION OF PUBLIC PROPERTY.** A city has no power, either under section 470 of the Code, or under section 1, chapter 89, Laws of 1880, or under any other statute, to convey its real estate to the county in which it is located, in consideration of the location of the county-seat in such city. (Compare *District Township v. Thomas*, 59 Iowa, 50.) *Brockman v. City of Creston*, 587.
2. **UNLAWFUL DISPOSITION OF PROPERTY : INJUNCTION BY TAXPAYER : GOOD FAITH : EXTENT OF INTEREST.** Where a city is attempting to dispose of the public property without authority of law, one who has property liable to taxation in the city may maintain an action to restrain such disposition, though he be not a resident of the city (see opinion for citations); and the court cannot inquire into his motives in prosecuting the action, nor deny him relief because his interest as a taxpayer is inconsiderable. *Id.*
3. **——— : ——— : WHEN RIGHT OF ACTION MATURES.** Plaintiff in such case need not defer his action until a tax has actually been levied upon his property by reason of the wrongful disposition of the property of the city, but may have the preventive remedy by injunction as soon as damage is threatened by the unlawful act. *Id.*
4. **——— : REMEDY.** In such case injunction to prevent the unlawful act is the proper remedy, and not *certiorari*. *Id.*

5. **BREACH OF CONTRACT TO SUPPLY WATER : ACTION BY TAXPAYER.** The owner of city property which is destroyed by fire through a failure of a water company to supply water according to the terms of its contract with the city, cannot maintain an action for damages against the company, even though a special fund has been raised by the city by taxation to pay for a sufficient supply of water for use in case of fires, and the plaintiff has contributed to such fund. (Compare *Davis v. Waterworks Co.*, 54 Iowa, 59.) *Becker v. Keokuk Waterworks*, 419.
6. **THE SAME : CONTRACT BY CITY FOR INDEMNITY OF PROPERTY-OWNER.** The powers conferred upon municipal corporations are to be strictly construed (*Clark v. City of Des Moines*, 19 Iowa, 212; *McPherson v. Foster*, 48 Iowa, 57); and the law which authorizes cities to contract for the building and operation of waterworks by individuals or companies confers no power to contract with such individual or company to indemnify a citizen and taxpayer for damages which he may sustain by reason of a failure to furnish water as provided in the contract, so as to enable the citizen to maintain an action therefor in his own name. *Id.*
7. **DEFECTIVE STREET : NEGLIGENCE IN DRIVING ON : QUESTION FOR JURY.** It is not *per se* negligence for a person to drive upon a street which he knows to be defective; but the question of negligence in such a case is one for the jury, to be determined from all the circumstances. (See opinion for citations.) *Byerly v. City of Anamosa*, 204.
8. ——— : **LIABILITY OF CITY : ACCEPTANCE OF STREET BY ORDINANCE.** Where a city by ordinance has required a street to be improved and sidewalks to be constructed thereon, and it has been used for a great many years as one of the principal thoroughfares of the city, the city is liable for an injury resulting from its negligence in caring for it, though it has never accepted the street by special ordinance, Section 527 of the Code, providing for the acceptance of streets by special ordinance, does not apply. (*Laughlin v. City of Washington*, 63 Iowa, 652, *distinguished.*) *Id.*
9. ——— : ——— : **ACCIDENT NOT FORESEEN.** It is the duty of a city to take such care of its streets as is reasonably necessary for the security of travelers, and where it fails so to do, and in consequence an injury occurs, it cannot escape liability on the ground that an accident and injury of that particular kind could not be foreseen. *Id.*
10. ——— : **INJURY TO FRIGHTENED HORSE : PROXIMATE CAUSE** Where a horse driven by his owner on a city street became frightened and ran away, and went over an embankment which it was the duty of the city to protect by a railing, whereby it was killed, *held* that the negligence of the city in not providing the railing was the proximate cause of the injury, and that the city was liable. (See opinion for cases followed and distinguished.) *Id.*
11. **STREETS : NEGLIGENCE LEADING TO OBSTRUCTION : EVIDENCE.** In an action for injury to plaintiff's horse, caused by rubbish deposited on one of defendant's streets by the overflow of a culvert of insufficient capacity, *held* that it was error to exclude evidence that the culvert was of insufficient capacity and that it was choked up with rubbish, and that, by reason thereof, the rubbish causing the injury was deposited in the street; for, if defendant's negligence in the construction of the culvert caused the overflow, then the obstruction caused by the overflow was the result of that negligence. *Hazzard v. City of Council Bluffs*, 106.

12. **LIABILITY FOR INJURIES NOT FORESEEN.** In such case it was error to instruct the jury that the defendant was not liable for negligence in constructing the culvert, on the ground that "the injury could not reasonably have been foreseen and apprehended as a result of the insufficient capacity of the culvert;" for if defendant was negligent, as alleged, it was liable for the results of such negligence, though it was impossible to foresee the particular injury resulting therefrom. *Id.*
18. **TAXES FOR PAVING STREETS: COLLECTION BY ACTION.** The ordinances of the city of Muscatine provide that the expense of paving the streets may be assessed upon the abutting lots, "which shall have the effect of a special tax thereon, and they may be sold therefor as for a tax;" also that, if the assessments be not paid by the person or persons chargeable therewith, they shall be levied as a special tax upon the property liable therefor; "and all the provisions of law relating to special assessments, and for the enforcement and collection of the same, shall apply to the assessments levied under the provisions of this ordinance." *Held* that, while the property affected by the assessments became bound by a lien, the city could collect the taxes by personal action against the owners. (Compare *City of Dubuque v. Railway Co.*, 39 Iowa, 58.) *City of Muscatine v. Chicago, R. I. & P. Ry. Co.*, 645.

CODE.

See STATUTES CITED, CONSTRUED, ETC.

CONDITIONS PRECEDENT.

See CONTRACTS, 6.

CONSIDERATION.

See CONTRACTS, 2, 8.

CONSPIRACY.

1. **WHEN NOT ACTIONABLE: EVIDENCE.** The defendants, by counterclaim, sought to recover of plaintiff for an alleged conspiracy with one W., whereby defendants were induced to ship property to Iowa for W., but which was consigned to defendants; the object of the conspiracy being to get property of the defendants within the jurisdiction of the courts of Iowa, that the plaintiff might attach it in this case, which he did. The order on which it was shipped provided that it was not to pass to W. until he paid for it upon delivery, and it never was paid for, nor delivered to any one. *Held* that, if there was a conspiracy as alleged, it did not operate to deprive defendants of their property, and that the court properly refused to require plaintiff to testify in regard thereto. *Blackmore v. Fairbanks*, 282.
2. **EVIDENCE.** See Counties, 8; Evidence, 6.

CONTEMPT.

See APPEALS, 2.

CONTINUANCE.

See CRIMINAL LAW, 6; PRACTICE AND PROCEDURE, 4.

CONTRACTS.

1. **BUILDING: PARTIAL FAILURE: RECOVERY: MEASURE OF DAMAGES.** Where a party contracts for an agreed price to make certain improvements on the real estate, but fails to comply with the

contract in some particulars as to the materials used and the manner of construction, he may yet recover upon a *quantum meruit*, though the owner has not accepted the work; and the measure of his damages will be the contract price, less payments, and the damages sustained by reason of the non-compliance with the contract. (See opinion for citations.) And an instruction in this case, directing the jury to allow plaintiff the value of such items as were of real, substantial benefit to defendant, was erroneous, because it ignored the contract price. *Aetna Iron & Steel Works v. Kossuth County*, 40.

2. **CONSIDERATION: ACTION BY BENEFICIARY.** Where a sheriff had levied upon a lot of hogs under execution in favor of plaintiff and against B., and defendant claimed to be the owner of the hogs, and he entered into a written contract with the sheriff, whereby he was permitted to take and sell the hogs, upon his agreement to hold the proceeds subject to the order of the court, and that the rights of plaintiff and the sheriff should be in no wise prejudiced, *held*—
 - (1) That the instrument, being in writing, imported a consideration. (Code, sec. 2113.)
 - (2) That the instrument was intended as a security for plaintiff, and that he was, therefore, entitled to bring an action upon it, under section 2552 of the Code. (See opinion for citations.) *Allen v. Platt*, 113.
8. **NEW CONTRACT ANNULLING THE ORIGINAL: CONSIDERATION: PLEADING AND PROOF.** Where, in an action upon a contract, defendant answered that the one sued on was annulled by a new one subsequently made and based upon another consideration, the court properly instructed that the defendant had the burden to prove, not only the new contract as alleged, but that it was sustained by some new consideration moving to plaintiff. Although, in this case, the consideration for the original agreement may have been sufficient to sustain the second one, the instruction was justified by defendant's theory of his defense, as stated in his answer. *Pelley v. Walker*, 142.
4. **RIGHT TO TERMINATE: SALE OF GOODS AND DIVISION OF PROFITS.** Where plaintiff placed goods in the hands of another to be sold, the latter to have all the profits up to a certain sum per month, and the residue of profits to be divided equally, "to such time as the party of the first part [plaintiff] may choose," *held* that plaintiff had the right to terminate the contract at any time. *Bray v. Flickinger*, 313.
5. **CONDITION: PLEADING AND PROOF.** In an action upon a contract to pay rebates upon the breaking of a pool between defendant and other railway companies, it was not necessary for plaintiff to allege or prove the parties to the pool nor the terms thereof, but it was sufficient, to sustain a verdict for plaintiff, to introduce evidence tending to show the existence of the pool and the breaking thereof. *Marsh v. Chicago, R. I. & P. Ry. Co.*, 332.
6. **CONDITION PRECEDENT: WHAT IS NOT.** In a contract for a lease the following language occurred: "The one hundred dollars to be paid on signing of said lease is to apply on first month's rent." There was no other reference to the one hundred dollars in the contract. *Held* that the payment of the one hundred dollars was not a condition precedent to the making of the lease; and that, as the contract was not ambiguous on that point, the fact that the proposed lessee

paid the one hundred dollars before the lease was made did not show that it was the understanding of the parties that such payment was a condition precedent. (*Corbett v. Berryhill*, 29 Iowa, 158, and *McDaniels v. Whitney*, 38 Iowa, 60, distinguished.) *Hall v. Horton*, 352.

7. **TO MAKE LEASE : BREACH : DAMAGES.** Where a contract for a lease provided for the payment by plaintiffs (lessees) of one hundred dollars upon the execution of the lease, and they paid fifty dollars, but, through no fault of theirs, the lease was never executed, they were entitled to recover at least the fifty dollars paid by them. *Id.*
8. ——— : **BREACH : MEASURE OF DAMAGES.** While the measure of damages for a breach of contract to make a lease and put a tenant in possession, where no rent has been paid, is the remainder of the market rental, after deducting the agreed rental (*Alexander v. Bishop*, 59 Iowa, 572), yet other damages which are the direct and natural consequence of the breach of contract can be recovered. (*Adair v. Bogle*, 20 Iowa, 244.) And in this case, *held* that, for breach of contract to lease a hotel, plaintiffs were entitled to recover for their loss of time in waiting for the hotel, and for their expenses in coming from a distant state to the place where the hotel was, and for money paid under contract to a clerk whom they had employed, and brought with them to aid in operating the hotel. *Id.*
9. ——— : ——— : **EVIDENCE.** Where, in an action for breach of contract to make a lease, the value of the lease was put in issue by the first count of the petition and the general denial of the answer, but plaintiffs offered no evidence to sustain that count, and evidence offered by defendant as to the value of the lease was not offered in rebuttal, and did not tend to sustain any affirmative defense pleaded, it was properly rejected. *Id.*
10. ——— : ——— : **EVIDENCE OF PAYMENT.** In such case, evidence which tended to show that plaintiff had made a payment on the lease by paying money to third parties on account of and for the benefit of defendant, and that it was made and received on the conditions authorized, was competent. *Id.*
11. **GAMBLING CONTRACT : WHAT IS NOT.** Defendant gave his note for one hundred and fifty dollars for fifteen bushels of Bohemian oats, and for an interest in an agreement, whereby thirty bushels of the oats raised from those purchased were to be sold for him at ten dollars per bushel. This agreement was definite and free from contingency, but it embraced a clause to the effect that the transaction was of a speculative character, and not based upon the real value of the grain. *Held* that it was not a gambling contract within the meaning of section 4029 of the Code, and that recovery upon the note could not be defeated on that ground. *Hanks v. Brown*, 560.
12. ——— : **STATUTE STRICTLY CONSTRUED.** Section 4029 of the Code, defining and making void gambling contracts, being a criminal statute, cannot be extended to transactions which are not within the letter of it, although within its reason and policy. (See opinion for citations.) *Id.*
13. **CONSTRUCTION : DUTY OF COURT.** Where there is no dispute as to the facts involved in the making of a written contract in suit, it is the duty of the court to determine the questions of law. *Id.*

14. **EXCHANGE OF LANDS: MUTUAL MISTAKE: RESCISSION IN EQUITY: ACTION BASED ON FRAUD.** Where plaintiff conveyed his farm to defendant for land which neither of them had seen, being situate in a distant state, but which defendant said he believed, from what he had heard of it, would make a good stock farm, but which the evidence (see opinion) shows was not fit for that purpose, and was of little value for any purpose, *held* that there was a mutual mistake,—on the part of defendant as to the kind of land he was conveying, and on the part of plaintiff as to the kind of land he was getting,—and that equity would compel a restoration, even though the action was based upon alleged fraudulent representations upon the part of defendant, which were not proved. (Compare *Swezey v. Collins*, 36 Iowa, 589, and other cases cited in opinion.) *Hood v. Smith*, 621.
15. **UNDERSTANDING OF PARTIES: CONSTRUCTION.** Section 8652 of the Code, which provides that “when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it,” applies to oral as well as to written contracts. *Cobb v. McElroy*, 603.
16. **EFFECT OF ASSIGNMENT UPON.** See Assignment for Benefit of Creditors, 1.
17. **WHO MAY SUE ON CONTRACT.** See Cities and Towns, 5, 6.
18. **UNDUE INFLUENCE.** See Deeds, 1, 2.
19. **IMPLIED PROMISE: SUPPORT OF CHILD.** See Domestic Relations, 1, 2.
20. **PAROL TO VARY WRITING.** See Evidence, 7-10.
21. **SUNDAY CONTRACTS: RATIFICATION.** See Promissory Notes, 1-4; Sales, 6.

FOR CONTRACTS OF VARIOUS KINDS, see appropriate titles.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVEYANCES.

FOR CONVEYANCES OF VARIOUS KINDS, see appropriate titles.

CORPORATIONS.

1. **DEFECTIVE ORGANIZATION: RIGHTS OF STOCKHOLDERS AMONG THEMSELVES.** Plaintiffs and defendants were stockholders in a company of which plaintiffs were directors. The articles of incorporation were never recorded. Plaintiffs, as directors, borrowed money for the company's use far in excess of the capital stock, giving their personal obligations therefor, which, upon the failure of the company, they were obliged to pay, and they now seek contribution of the defendants on the ground that, because the organization of the corporation was defective, they were partners and not stockholders; but *held* that, as between themselves, at least, they were stockholders, and that their rights were determined by the articles of incorporation, which exempted the stockholders from corporate debts, and limited the company's indebtedness to a certain percentage of the stock, which last provision the plaintiffs, as directors, violated in contracting the indebtedness in question, and that they could not recover. *Heald v. Owen*, 23.

2. **SUBSCRIBERS TO STOCK : LIABILITY TO CREDITORS : ESTOPPEL.** Defendant was a subscriber to the stock of a corporation of which plaintiff afterwards became a creditor. The capital stock of the corporation was fixed at twenty thousand dollars, all of which was required to be subscribed before it could begin business. Defendant first subscribed for twenty-five hundred dollars' stock, and afterwards for twenty-five hundred dollars' preferred stock, but it appears that the condition making the second subscription one for preferred stock was erased without defendant's authority. But defendant was one of the organizers and promoters of the corporation, and was always one of its directors, and he knew that the articles of incorporation made no provision for preferred stock, and also that both of his subscriptions were required to make the twenty thousand dollars necessary for the beginning of business. *Held* that, whatever the effect of his second subscription, with the condition erased, might be as between him and the corporation, he was estopped from denying liability thereon as to a creditor of the corporation seeking assets out of which to make its demand. *Tama Water-Power Co. v. Hopkins*, 653.

3. ——— : ——— : **SET-OFF.** A stockholder in a corporation, who is indebted for stock, cannot, as against a judgment creditor of a corporation who seeks to subject the amount due from the stockholder to the satisfaction of his judgment, set off against such amount a debt owing by the company to him. (*Boulton Carbon Co. v. Mills*, 78 Iowa, 460, *followed.*) *Id.*

4. ——— : ——— : **STATUTE OF LIMITATIONS.** Where it is sought to make a stockholder liable to a judgment creditor of a corporation to the extent of the balance due on stock subscribed for by the former, he cannot plead the statute of limitations as to so much of the indebtedness on which the judgment was rendered as accrued more than five years prior to the beginning of the suit against him, where the judgment was rendered on a note given in settlement of said indebtedness before it was barred by the statute. *Id.*

5. ——— : ——— : ——— : **ABSENCE FROM STATE.** In such case, where the subscription was in writing, and it was collectible more than ten years prior to the suit brought by the creditor against the stockholder, but he was not a resident of the state for ten years of that time, the action against him was not barred. *Id.*

6. ——— : ——— : **DISSOLUTION OF CORPORATION : REMEDY.** In such case, though the corporation had ceased to exist, the remedy by the creditor against the stockholder was the one prescribed by sections 1082-1084 of the Code, and there is no requirement that the action be in equity; and where the proceeding, as one at law, was not objected to in the lower court, the objection cannot be raised here. (Compare *Bayliss v. Swift*, 40 Iowa, 651.) *Id.*

7. **ASSETS : DIVIDENDS.** The assets of a corporation consist of cash in hand and other property; and, if such assets exceed the liabilities, a dividend can lawfully be declared. Money paid out is not assets. If paid for property that is on hand, the property is assets; if expended in a way that has enhanced the value of the general assets, it is included in their valuation; if so expended as to have brought no property, or no enhancement of that on hand, then it is a loss, and should not be counted as assets. *Hubbard v. Weare*, 678.

8. ——— : **WHAT ARE AND WHAT ARE NOT : SPECIAL CASES.** In considering what are and what are not to be considered as assets of a corporation, *held*—

- (1) That, in estimating the assets at the end of a certain year, the profits of the preceding year should not be included as a separate item, where no such profits have been declared, and have not in any way been separated or withdrawn from the general assets.
- (2) Money paid out for moving machinery and materials that went into the buildings should not be counted as a separate item, if the aggregate value of the buildings is given.
- (3) Money expended in exhibiting machinery at fairs enters into the value of the general assets, and should not be counted as a separate item.
- (4) Bills receivable should not be counted at their face without making such approximate deductions for loss as experience teaches to be inevitable.
- (5) While interest on bills receivable should be counted as assets, interest on bills payable should be estimated in the liabilities.
- (6) Money expended in the experimental construction of a new machine should not be counted as assets, but the actual value of the machine may be counted, if it has any ; if not, the expenditure has been lost.
- (7) Expenses should not be included as a separate item ; if wisely made, they only enhance the value of the general assets. *Id.*

9. FRAUD BY OFFICERS OF. See False Representations, 6-12.

FOR MUNICIPAL CORPORATIONS, see Cities and Towns, Counties, Schools.

COSTS.

See CRIMINAL LAW, 1, 2, 15 ; PRACTICE AND PROCEDURE IN SUPREME COURT, 5.

COUNTIES.

1. ACTIONS BY : COUNTY ATTORNEY. An action by a county to recover money due it will not be dismissed on the ground that counsel other than the county attorney prosecutes it under the direction and employment of the board of supervisors ; for the board has the right, by virtue of its general powers to manage the affairs of the county, to employ counsel, and to cause proceedings to be instituted in the name of the county without the consent of the county attorney, and regardless of his willingness or ability to appear for the county. (See opinion for statutes considered and cases cited.) *Taylor County v. Standley*, 666.
2. RECOVERY OF MONEY OBTAINED THROUGH TREASURER : REMEDY. Where defendant, by conspiracy with the treasurer of plaintiff, came into possession of plaintiff's money, and refused to pay it to plaintiff, an action was properly begun and maintained against him therefor. Plaintiff was not confined to its remedy on the treasurer's bond. *Id.*
3. — : CONSPIRACY : EVIDENCE. Where in such action the evidence tended to show that the transactions between the treasurer and defendant, involving the money of plaintiff, began when the former entered upon the duties of his office, and were continued

until his last settlement with the plaintiff's supervisors, *held* that evidence of statements made officially by the treasurer, as a part of his semi-annual settlements with the supervisors, was properly admitted as tending to show the amount of money for which the treasurer was liable at different times, and, when considered with other evidence, the dealings between him and defendant under the alleged conspiracy between them. *Id.*

4. SECURITY OF COUNTY FUNDS DEPOSITED. See Banks and Banking, 1 2.

See BRIDGES, 1.

COUNTY ATTORNEYS.

See COUNTIES, 1.

COUNTY TREASURER.

AUTHORITY OF. See Banks and Banking, 1.

See COUNTIES, 2, 3.

CREDITOR'S BILLS.

1. PARTIES: JOINDER OF SEVERAL CREDITORS. Several judgment creditors may join in an action against the trustee of their common debtor, alleging that they have no adequate remedy at law, and seeking the discovery of property which may be subjected to the payment of their judgments, and asking that the trustee be required to discharge (certain alleged duties, which it is claimed would result in placing property of the judgment debtor within the reach of legal process. (See opinion for statutes and cases cited.) *Gorrell v. Gates*, 632.
2. PLEADING. In an action against a trustee of the debtor under a will, to discover assets of the debtor and to compel the trustee to perform his duties, to the end that the debtor's property might become subject to execution, the petition alleged that three certain tracts of land had been set apart to the trustee, and the title thereto decreed in him, for the uses and purposes authorized by the will, and that said land was so set apart by partition, which, however, did not include all the realty of the decedent. *Held* that plaintiffs were improperly required, upon motion, to state the value of each of said tracts of land, on the ground that, having been set apart to the trustee, if their aggregate value was greater than the claims of plaintiffs, their action could not be maintained; for the petition further showed that the will made it the duty of the trustee to provide money for many purposes pertaining to the welfare of the judgment debtor, and it did not appear for what obligations of that kind the land might be already liable; so that the fact, if it so appeared, that the land would sell for more than enough to satisfy plaintiffs' claims, could not affect their right to maintain the action. *Id.*

CRIMINAL LAW.

1. INFORMATION: TAXING COSTS TO INFORMANT. Where the defendant in an information is convicted before a justice of the peace, and he appeals to the district court, the conviction is conclusive proof that there was probable cause for the information, and the district court cannot inquire into that matter, and tax the costs to the informant on the ground that there was no probable cause for the information. (*In re Trenchard*, 16 Iowa, 53, distinguished.) *State v. Hodgson*, 462.

2. ———: ———: APPEAL: TIME OF TAKING. An appeal from a judgment taxing the costs of a prosecution upon information to the prosecuting witness, on the ground that the prosecution was without probable cause, is an appeal in a criminal case, and may be taken within one year from the date of the judgment. (Code, sec. 4522, and *State v. Knapf*, 61 Iowa, 522.) *Id.*
3. ———: FACTS NOT STATED: INSUFFICIENCY: ARREST OF JUDGMENT. An information for disturbing a school, "for that the defendant * * * did commit the crime of unlawfully and wilfully disturbing and interrupting a school taught by," etc., is insufficient to sustain a conviction, because it fails to state the facts constituting the offense; and an objection based on such insufficiency may be raised for the first time on a motion in arrest of judgment. (See opinion for citations.) *State v. Butcher*, 110.
4. ———: ———: AMENDMENT AFTER VERDICT ON APPEAL. While an information may be amended in justice's court, and after appeal to the district court, and the law in this respect is very liberal (see opinion for citations), yet where the cause has been appealed to the district court and a verdict has been rendered against defendant there, upon an information which fails to state the facts constituting the offense charged, it is then too late to amend the information by stating such facts. *Id.*
5. GRAND JURY: MODE OF DRAWING: SUBSTANTIAL DEPARTURE FROM LAW: INDICTMENT QUASHED. The provisions of the law in relation to the mode of obtaining grand jurors is directory. (See *State v. Gillick*, 7 Iowa, 287; *State v. Carney*, 20 Iowa, 82.) The law as now existing (See McClain's Ann. Code, sec. 319) requires that after the ballots bearing the names from which the grand jurors are to be drawn have been placed in a box and mixed, the clerk shall draw the number of jurors required, but that not more than one shall be drawn from each township, unless more jurors are required than there are townships in the county. In this case, where there were fifteen townships in the county and only twelve grand jurors were required, the ballots bearing the names of persons liable to be drawn from each township were sealed in separate envelopes, which were then placed in the box, and the clerk drew therefrom twelve of them. The ballots from each of the envelopes so drawn were then placed in the box, and the clerk drew one therefrom, thus obtaining twelve grand jurors. *Held* that the method was a substantial deviation from the method prescribed by statute, and that an indictment found by a grand jury composed of seven of the jurors so drawn was properly quashed. (See opinion for citation of related cases.) *State v. Beckey*, 368.
6. CONTINUANCE ON COURT'S OWN MOTION. Defendant was charged with murder in the first degree. On the second day of the term he moved for a continuance to the next term for the purpose of procuring the testimony of absent witnesses. As the record then stood, the motion was properly overruled, and defendant excepted. Afterwards defendant moved for a postponement of the trial to a subsequent day of the term, and the motion was granted. The record upon this motion shows that there was then credible evidence before the court that the depositions of the absent witnesses had been taken and mailed to the place of trial, but, by no fault of defendant, they had failed to arrive; and that the witnesses had therein testified to facts inconsistent with defendant's guilt. On the day to which the trial had been postponed these depositions had not yet arrived, but no further continuance was then asked, and defendant was put upon his trial, found guilty, and sentenced.

- to death. *Held* that it was the duty of the court, in the furtherance of justice, after learning the facts which the evidence tended to prove, and which were inconsistent with defendant's guilt, to continue the cause to the next term on its own motion, upon the application made therefor at the beginning of the term, though a postponement to a day in the same term was afterwards asked, granted and accepted. *State v. Foster*, 726.
7. **PRACTICE: MISSTATEMENT OF LAW BY COUNSEL.** Counsel, in a prosecution for keeping a house of ill fame, in argument to the jury, said: "The rule is that if defendant has evidence at his command, and fails to use it, it weighs against him," and under this rule he drew the inference that defendant was guilty; because, if he was not, he could have proved the contrary by his wife and son, whom he failed to put upon the stand. *Held* that, though the rule as stated was wrong (which, however, is not decided), yet a misapprehension and misstatement of the law by counsel in argument is no ground for a reversal. *State v. Toombs*, 741.
 8. **TRIAL BY JURY OF ELEVEN: CONSENT: LEGALITY.** Where, after a trial for a felony has begun to a jury of twelve men, one of them becomes sick, the defendant may, with the consent of the state and the court, waive a jury of twelve men, and agree that the trial shall proceed with the eleven jurors, and that their verdict shall "be as valid and binding as though rendered by a full jury," and a verdict of guilty and judgment thereon cannot afterwards be questioned on the ground that the jury was not full. (*State v. Kaufman*, 51 Iowa, 578, *followed*.) *State v. Grossheim*, 75.
 9. **PRACTICE: LOST INDICTMENT.** The indictment in this case having been lost, a copy was substituted after the jury was impaneled and sworn. *Held* that the objections that the jury was not sworn to try the case upon a copy of the indictment, and that the court had no jurisdiction to impanel a jury when no indictment was in existence, were merely technical, and did not affect the merits, and was no ground for reversing a judgment of conviction. *State v. Shank*, 47.
 10. **INSTRUCTIONS: PROOF BEYOND REASONABLE DOUBT.** Where the court in one instruction has made it plain that the state must prove the facts constituting defendant's guilt beyond a reasonable doubt, it is not prejudicial error to begin other instructions thus: "If you find from the evidence that defendant," etc., without each time saying, "if you find beyond a reasonable doubt," etc. *State v. Rainsbarger*, 745.
 11. **IMPEACHMENT OF DEFENDANT: INSTRUCTION AS TO EVIDENCE.** Where defendant in a criminal case was a witness in his own behalf, and there was evidence tending to impeach him, the court rightly instructed that the impeaching evidence should only be considered to the extent of determining the weight and credit, if any, to be given to defendant's testimony as a witness in his own behalf; and it was not necessary to add that the jury should not allow it to influence them in any manner against the defendant as a party to the suit. *Id.*
 12. **INSTRUCTIONS: WHEN PROPERLY REFUSED.** An instruction asked is rightly refused when the same thought is clearly expressed in the instructions given. *Id.*
 13. **"AIDING AND ABETTING."** The word "abet," used in relation to the commission of a crime, indicates the act of an accessory before the fact, while the word "aid" indicates the act of an accessory

after the fact. An accessory before the fact may be indicted, punished and tried as a principal (Code, sec. 4314); whether the same is true of an accessory after the fact, is not determined. *State v. Empey*, 460.

14. JUDGMENT OF GUILTY OF ONE OF SEVERAL COUNTS: INFERENCE AS TO THE OTHERS. Defendant was tried before a justice of the peace upon an information charging four distinct offenses in as many counts. The justice found him guilty on the first count, but made no finding of record upon the other counts. *Held* that he was, by inference, acquitted on the other counts, and that, upon an appeal by him to the district court, he could not be again legally tried upon any but the first count. *State v. Severson*, 750.
15. COSTS: MILEAGE OF DEFENDANT'S VOLUNTARY WITNESSES. Defendant's father, at request of defendant's counsel, came from Dakota to Iowa to testify, and he did testify, in the defendant's behalf, on the trial of a criminal prosecution against defendant. He was not subpoenaed, but his name was included in the list of witnesses which defendant was authorized to subpoena, by an order of the court made under chapter 207, Laws of 1880. *Held* that he was entitled, upon defendant's acquittal, to have costs taxed up against the county for his daily attendance, but to nothing for mileage. (*Westfall v. Madison County*, 62 Iowa, 427, distinguished.) *State v. Willis*, 326.
16. APPEAL: AFFIRMANCE ON MOTION. Section 4538 of the Code, which requires this court to examine the record in criminal cases appealed, and without regard to technical errors or defects, to render such judgment on the record as the law demands, forbids the affirmance of a judgment of conviction upon motion of the state. *State v. Bahne*, 472.
17. ———: JUDGMENT ON APPEAL BOND. Upon the affirmance of a judgment of conviction, this court cannot render judgment upon the appeal bond when the bond is not before the court. *Id.*
18. BAIL-BOND: RECITATIONS OF: ESTOPPEL. A surety in a bail-bond, which recites that an adjournment of the case was ordered, and that the bond was executed to give the accused the benefit of the order, cannot, when the obligation is about to be enforced, deny these recitations, and plead as a defense that the bond was executed before the accused was brought before the court. *State v. Benzion*, 467.
19. ———: PREPARATION OF IN ANTICIPATION OF AN ADJOURNMENT. It is no objection to the validity of a bail-bond that it was prepared and signed before the accused was brought before the justice, in anticipation of an application for an adjournment. (Compare sec. 4189 of the Code.) *Id.*
20. ———: SURETY: DISCHARGE BY CONTINUANCES. A surety cannot be exonerated from liability on a bail-bond on the ground that the preliminary hearing was several times continued by agreement without his consent, and without the appearance of the accused when the continuances were ordered. *Id.*
21. ———: ACTION ON: EVIDENCE. In an action upon a bail-bond the plaintiff introduced in evidence the information filed before the justice of the peace, the warrant issued thereon, and the return thereof, showing the arrest of the accused, the record of the justice showing an order requiring him to give bail to answer the charge before the district court, and the bail-bond in suit; also the record of the district court, showing a default upon the bond rendered on

account of the failure of the accused to appear; but the indictment was not offered in evidence. After the submission of the case, and when defendants and their counsel were absent, the court permitted the indictment to be introduced. *Held*—

- (1) That the adjudication of the default, as shown by the evidence, was binding on the sureties of the bond, though made when they were not present.
 - (2) That that adjudication presumed an indictment to which the accused had failed to respond.
 - (3) That, therefore, the permission given to introduce the indictment under the circumstances named was, at most, error without prejudice.
 - (4) That the other evidence was sufficient to fix defendants' liability on the bond. *State v. Coppock*, 482.
22. ———: ———: PAROL TO VARY TERMS OF. Where in such case the bond was conditioned, as required by law, for the appearance of the accused at the next term of the district court, the testimony of the defendants, that the justice informed them when they signed the bond that he would not be required to appear until a later term, was properly excluded. *Id.*
23. ASSAULT WITH INTENT TO KILL: EVIDENCE TO CONVICT. Defendant was indicted for an assault alleged to have been made upon one S., by shooting at him with a revolver, with intent to kill him. The evidence (see opinion) as to the number of shots fired by defendant, and as to whether he intended to injure S., was conflicting, and, as the trial court refused to set aside a verdict of guilty as not being sustained by the evidence, this court cannot interfere. *State v. Rainsbarger*, 745.
24. BURGLARY WITH INTENT TO STEAL: INDICTMENT. In an indictment for burglary with intent to steal, under section 3894 of the Code, it is not necessary to allege the fact of larceny, and hence not necessary to allege the character, value and ownership of the property intended to be stolen. (Compare *State v. Newberry*, 26 Iowa, 467.) *State v. Jennings*, 513.
25. ———: EVIDENCE: POSSESSION OF STOLEN GOODS. In a prosecution for burglary with intent to steal, where goods have actually been stolen from the burglarized building, possession of the stolen goods by the defendant soon after the commission of the burglary is evidence from which the jury may find the defendant guilty, but is not *prima-facie* evidence of guilt in such a case, as it is in cases of larceny. (See opinion for explanation of apparently conflicting cases.) *Id.*
26. FALSE PRETENSES: DRAFT DRAWN AGAINST NO FUNDS: INDICTMENT: SUFFICIENCY. The indictment in this case charges the defendant with obtaining money and property upon the false pretense that he had money in a certain bank, upon which he drew a draft which he gave in exchange for the money and property. Upon examination of the indictment (see opinion), *held* that it was not vulnerable to the objection that the facts constituting the offense were not set out with sufficient fulness,—the averments being sufficient to inform defendant of the charge against him, and of the facts which could properly be shown to prove it; nor to the objection that it did not show when the draft was payable,—it sufficiently appearing from the language used that it was payable at sight. *State v. Cadwell*, 473.

27. **CHANGE OF VENUE: DISCRETION OF COURT.** An application for a change of venue in a criminal case, based upon the alleged prejudice of the people of the county, and supported by affidavits and resisted by counter affidavits, is addressed to the sound discretion of the trial court, which this court will not interfere with in the absence of a showing of abuse. *Id.*

28. **FALSE PRETENSES: DRAFT DRAWN AGAINST NO FUNDS: INDICTMENT AND PROOF.** The indictment charged defendant with drawing a draft upon a bank in which he had no funds, and delivering it in exchange for money and property. Defendant and another were partners in the banking business, and the draft in question was drawn in the name of the bank owned by them, by himself as cashier. *Held* that it was not admissible in evidence to sustain the indictment, because it was not his draft, and was not payable out of his funds, if he had any, in the bank upon which it was drawn. *Id.*

29. **FORCIBLE DEFILEMENT: INDICTMENT: DUPLICITY.** An indictment which charges that the defendant did "wilfully, unlawfully and feloniously take one S., unlawfully and against her will, and, by force and menace and duress, compelled her, the said S., to be defiled, and then and there laid hold of her, the said S., with his hands, and held her upon the ground and did then and there force, ravish and have carnal knowledge of her, the said S., and in the manner and form aforesaid did then and there defile her," is good as an indictment for forcible defilement, under section 3862 of the Code, and is not vulnerable to the objection that it also charges the crime of rape. *State v. Montgomery*, 737.

30. ———: **EVIDENCE TO SUSTAIN VERDICT: CORROBORATION.** The evidence in this case considered (see opinion) and held sufficient to sustain a verdict of guilty of forcible defilement, as against the objection that the prosecutrix consented to all that was done. It was not necessary that she be corroborated in order to justify a verdict of guilty. (See *State v. Grossheim*, ante, p. 75.) *Id.*

31. ———: **EVIDENCE AS TO BODY OF CRIME.** In such case a witness was properly permitted to testify that he examined the clothing worn by the prosecutrix at the time the offense was committed, and that he found certain stains thereon indicating that sexual intercourse had been attempted or accomplished. (*State v. Stowell*, 60 Iowa, 538, and *State v. Painter*, 50 Iowa, 319, distinguished.) *Id.*

32. **FRAUDULENT BANKING: INDICTMENT AND PROOF: AGENCY.** An indictment charging defendants with fraudulent banking, in that they received a certain deposit at a stated time and place, when they were insolvent, is sustained by proof that their cashier received the deposit as their agent; the ruling applying that what one does by his agent he does himself. *State v. Cadwell*, 432.

33. ———: **"DEPOSIT" DEFINED.** Such indictment is sustained by proof of the receipt of money upon a certificate of deposit,—the transaction in such case being as truly a "deposit," within the meaning of the statute, as is an ordinary call deposit. *Id.*

34. ———: **INSOLVENCY: EVIDENCE.** As tending in some degree to prove the insolvency of the bank at the time of accepting the deposit, it was competent to introduce an assignment for the benefit of creditors, made by defendants five months after the date of the deposit. *Id.*

35. **THE SAME : OPINIONS OF EXPERT ACCOUNTANTS.** In such case, an expert accountant, who has examined the books of the bank with reference to its solvency at different times, may, in connection with the *data* upon which his opinion is founded, testify as to his opinion concerning the solvency or insolvency of the bank. *Id.*
36. **THE SAME : VALUE OF DEFENDANTS' HOMESTEADS.** In such case, where the defendants had made an assignment which did not include their homesteads, *held* that evidence of the value of such homesteads was not admissible to show that they were solvent. *Id.*
37. **THE SAME : OPINIONS OF EXPERT ACCOUNTANTS : BEST EVIDENCE.** While the books of the bank in such a case are the best evidence of what they show as to the solvency of the bank, yet it is proper to aid the jury in determining what they show, by accompanying them with the opinions of expert witnesses who have examined them with reference to the point in question. *Id.*
38. **THE SAME : TWO BANKS OWNED BY INDICTED FIRM.** Where defendants were indicted as a firm, and the firm owned two banks in the same county, in one of which the deposit was received, it was competent to inquire into the solvency of both banks, for the purpose of ascertaining whether the firm was insolvent at the time of receiving the deposit. *Id.*
39. **FRAUDULENT BANKING : INSTRUCTION AS TO FORM OF CRIME NOT CHARGED.** Upon an indictment of the owners of a bank for receiving a deposit when they were insolvent, the court, in its instructions, quoted the statute under which the indictment was found, including language which made it a crime to "be accessory, or permit, or connive at, the receiving or accepting on deposit," etc. *Held* that this was not submitting to the jury an issue as to a form of the crime not charged in the indictment, since the whole charge made it clear that defendants were accused only of themselves receiving the deposit in question. *Id.*
40. ——— : **INSTRUCTIONS AS TO KNOWLEDGE.** In such case where the deposit was in fact received by defendants' cashier, it was sufficient, on the point of defendants' knowledge, to instruct that the deposit must have been received on their authority, and that they must have received it knowing of their insolvency. *Id.*
41. ——— : **INSOLVENCY : WHAT CONSTITUTES.** A firm engaged in banking is insolvent, within the meaning of chapter 153, Laws of 1880, making it a crime for bankers to receive deposits knowing of their insolvency, when it is unable to meet its liabilities as they become due in the ordinary course of business ; and bankers who receive deposits, knowing themselves to be thus insolvent, cannot escape the penalty of the law on the ground that they believe that, with time and indulgence, they can settle all demands. (See opinion for a discussion of the term "insolvency" upon the authorities.) *Id.*
42. **GAMBLING : EVIDENCE TO CONVICT.** Where, on an information for gambling, the evidence showed that the officer who arrested defendant went to a room in which language used in the game of poker, and the rattling of poker-chips and cards, was heard, and, upon demanding admission and being refused, he forced an entrance just in time to see one man escaping from a window, and found upon a table in the room poker-chips and cards used in the game of poker, and found defendant in an adjoining hall, which he could enter from the street only from the room in question, and defendant attempted no explanation of his presence there, *held* that it was sufficient to sustain a conviction. *State v. Boyer*, 330.

43. **HOUSES OF ILL FAME : INDICTMENT : STATUTE FOLLOWED.** An indictment which charges that the defendant kept a house of ill fame, resorted to by divers persons for the purposes of prostitution or lewdness, is not bad for duplicity on account of the use of the word "or" instead of "and." The indictment being in the language of the statute in that particular, it is not subject to the objection raised as to its form. (See citations in opinion.) *State v. Toombs*, 741.
44. ——— : **EVIDENCE : COMPETENCY.** In such case it was proper to permit a witness, who was an omnibus-driver, and who had often taken women to defendant's house, to testify that one woman whom he took there said to him that if "he saw any boys that wanted to come over to fetch them over." Such testimony was competent to show the character of the woman who made the house a stopping place, and was admissible, though the conversation was not had in defendant's presence. *Id.*
45. ——— : **EVIDENCE TO SUPPORT VERDICT.** Where the evidence showed that defendant's house was known as a house of ill fame, and that lewd women and licentious men made it a place of resort, the evidence was sufficient to support a verdict of guilty of keeping a house of ill fame. *Id.*
46. ——— : **LEWDNESS : DEFINITION.** In a prosecution for keeping a house of ill fame, the court defined lewdness to be an "irregular indulgence of the animal desires." *Held* that, while the definition was inaccurate, it was not misleading, as the jury would easily understand from the nature of the case that the court meant unlawful commerce between the sexes. *Id.*
47. **LARCENY FROM THE PERSON : EVIDENCE : IDENTIFICATION : LEADING QUESTION.** The money having been stolen from the person of the prosecuting witness as alleged, *held* that the evidence (see opinion) was sufficient to identify defendant as the thief ; and that, after the prosecuting witness had positively identified him as the criminal, it was not prejudicial error for counsel to point him out and ask the witness whether or not he was the man who committed the crime. *State v. Hall*, 674.
48. **LARCENY : INDICTMENT : SUFFICIENCY.** The indictment in this case alleged that defendant, at a named time and place, "took, stole and carried away one horse, of the value of one hundred and fifty dollars, the said property belonging to J. W.," etc. *Held* that it was not bad on the ground that it failed to state that the horse was "feloniously" taken,—for to charge the stealing of property of such value is to charge a felony ; nor on the ground that it did not charge that W. was the owner of the horse when taken,—it being sufficiently clear on that point ; nor on the ground that it did not charge the intent of the defendant to convert the horse to his own use,—the averment that he "took, stole and carried away" the horse being sufficient to show the intent. *State v. Griffin*, 568.
49. ——— : **AIDING IN DISPOSING OF PROPERTY : INSTRUCTION.** One who aids in the disposition of stolen property is not thereby guilty of larceny, either as principal or accessory, unless he knows the property to have been stolen ; and an instruction under which the jury might have found the defendant guilty without such knowledge is a ground for reversal, even though the abstract does not contain all the evidence ; for it cannot be presumed that his guilty knowledge was established by the evidence. *State v. Empey*, 460.
50. **MURDER : IN PRODUCING ABORTION : INDICTMENT : TWO COUNTS.** Where in the two counts of an indictment only one offense is charged, to-wit, the murder of a named woman by an attempt to

produce an abortion upon her, and in the first count it is charged to have been committed with some instrument to the grand jurors unknown, and, in the second, by administering certain drugs to the grand jurors unknown, *held* that the indictment was not bad for duplicity. (See Code, sec. 4300.) *State v. Baldwin*, 714.

51. ———: ———: ———: FIRST OR SECOND DEGREE. Neither count of the indictment in this case (see opinion) charges murder in the first degree, as neither charges an intent to take life. (See *State v. Gillick*, 7 Iowa, 312, and *State v. Johnson*, 8 Iowa, 525.) *Id.*
52. ———: INDICTMENT FOR FIRST DEGREE: TRIAL FOR SECOND. Although an indictment charges murder in the first degree, the state may waive a trial for that degree and insist upon a conviction for a lesser degree of the offense. *Id.*
53. ———: ACCESSORY BEFORE THE FACT: INDICTMENT: EVIDENCE. Since an accessory before the fact is a principal, under Code, section 4314, there is no variance between an indictment charging defendant as principal, and evidence which shows him to have been an accessory before the fact. *Id.*
54. ———: DYING DECLARATIONS: ADMISSIBILITY: QUESTION FOR COURT. It is the province of the judge, and not of the jury, to determine, from all the surrounding circumstances, whether, in a prosecution for murder, the dying declarations of the deceased are admissible. (See *State v. Elliott*, 45 Iowa, 487.) *Id.*
55. ———: ———: ———: CONSCIOUSNESS OF DANGER. Declarations made by decedent after she had heard her physician express the opinion that her symptoms were as bad as they could be, and that she might die at any time, and after she had expressed the belief that she was going to die, were admissible as dying declarations, as against the objection that she was not conscious of her danger when she made them. *Id.*
56. ———: ———: CHARACTER OF: ADMISSIBILITY. The dying declarations of the deceased are not admissible against the defendant in a prosecution for murder, unless they are restricted to the act of killing and to the circumstances immediately attending it, and form a part of the *res gestæ*; and they must relate to facts, and not to mere matters of opinion or belief. Accordingly, where the defendant was charged with the death of decedent, caused by an attempt to produce an abortion upon her by the use of instruments or drugs, used or administered either by himself or some one else, *held* that her dying declarations as follows: "He is the cause of my death. Oh! those horrible instruments! Laws. [defendant] is the cause of my death.—he is my murderer. They abused me terribly," were improperly admitted. *Id.*
57. RAPE: ASSAULT WITH INTENT: CORROBORATION OF PROSECUTRIX. The provision of section 4560 of the Code, that a defendant cannot be convicted of rape upon the testimony of the prosecutrix alone, unless corroborated by other testimony tending to connect him with the commission of the offense, does not apply to the crime of assault with intent to commit rape. (Compare *Rogers v. Winch*, 76 Iowa, 546.) *State v. Grossheim*, 75.
58. ———: ———: CONSENT: AGE OF FEMALE. Under the law, a female under the age of thirteen years is not competent to consent to sexual intercourse, nor can she consent to an assault for that purpose. (See opinion for citations.) Accordingly, in a prosecution for attempting to rape a girl of eleven years, *held* that the court properly refused to instruct that "an attempt to have sexual intercourse with a female, whether under or over the age of consent as fixed by law, when made with the consent of such female, and unaccompanied by violence, does not include an assault." *Id.*

59. ——— : ——— : PRESUMPTION FROM ACTS : INSTRUCTION. In such case the court instructed : "If you find from the evidence that the defendant took hold of the prosecutrix, and that he disarranged or removed her clothing so as to expose her person, and also opened his own clothes and exposed his private parts, and then, while he was lying down, he drew the prosecutrix down upon his person, then from these facts you are instructed the law would presume an intent on the part of said defendant to have sexual intercourse with the said prosecutrix." *Held* that the instruction did not state that such presumption would be conclusive, and that, so understood, it was correct. *Id.*
60. ——— : ——— : INDICTMENT. The indictment in this case (for an assault with intent to rape) is objected to on the ground that it charges an assault by force and against the will of the person assaulted, whereas, in law, she had no will, being under the age of consent. But *held* that the objection was not well taken. (Compare *State v. Newton*, 44 Iowa, 45.) *Id.*
61. SEDUCTION : EVIDENCE. In a prosecution for a seduction, the testimony of the prosecutrix that she understood that the defendant had living children other than the one borne by her was improperly admitted, as it was not relative to any issue in the case ; and it was prejudicial to the defendant. *State v. Thompson*, 703.
62. ——— : ——— : SECONDARY. In such case it was prejudicial error to permit the prosecutrix to testify that defendant had written to her and others that he was not the father of the child. The letters were the best evidence of what he had written, and there was no offer to produce them nor to account for them. *Id.*
63. ——— : ——— : SUBSEQUENT OFFER AND REFUSAL OF MARRIAGE. In such case the facts that defendant, after the seduction, offered to marry the prosecutrix, and that she refused, were competent only as bearing upon the question whether or not the alleged seduction was accomplished by means of a promise of marriage. Such offer of marriage, when not accepted by the prosecutrix, is no bar to the prosecution, under section 3868 of the Code. *Id.*
64. ——— : ——— : LETTERS FROM DEFENDANT. In a prosecution for seduction, letters purporting to have been written and sent by the defendant to the prosecutrix, and as to which there was evidence tending to show that they were so written and sent, and the contents of which tended to show the relations between him and the prosecutrix, were properly admitted against him. *State v. Bell*, 117.
65. ——— : ——— : ——— : INSTRUCTION. Where, in such case, the letters purported to be from defendant, and the prosecutrix testified that she received them, and another witness testified to having carried letters from him to her, but defendant's experts expressed the opinion that they were not all in the same handwriting, the court properly instructed that if defendant had some other person write any of them, and he then sent them as his own, the effect would be the same as if he had written them himself. *Id.*
66. ——— : ——— : CORROBORATION. Where, in addition to the contents of such letters, there was other evidence tending to show intimacy and courtship between the parties, the prosecutrix was sufficiently corroborated, as required by section 4560 of the Code, to justify a verdict of guilty. (As to what constitutes corroboration in such cases, see cases cited in opinion.) *Id.*
67. CRIMINAL STATUTES STRICTLY CONSTRUED. See *Contracts*, 12

68. FOR OFFENSES AGAINST THE STATUTES FOR THE SUPPRESSION OF INTEMPERANCE, see Intoxicating Liquors.

69. TRIAL FEES OF JUSTICES IN CRIMINAL CASES. See Justices of the Peace 2.

CUSTOM.

See RAILROADS, 3, 4.

DAMAGES.

1. CONVERSION OF COMMERCIAL PAPER: EVIDENCE. Commercial paper is presumptively worth its face, but in an action for its wrongful conversion its real value may be shown, as by proof of the insolvency of the maker. (See *Callanan v. Brown*, 31 Iowa, 341, and *Latham v. Brown*, 16 Iowa, 120.) In this case, where the face value of the notes converted by defendant was twenty-four hundred dollars, and he testified that he considered them worth seventeen hundred or eighteen hundred dollars, but their market value was not shown, and it did not appear that the mortgage security was inadequate, nor that the maker was insolvent, *held* that a finding by the jury that they were worth their face could not be disturbed on appeal. *Pelley v. Walker*, 142.
2. PROXIMATE CAUSE. See Cities and Towns, 10; Insurance, 1; Railroads, 19.
3. MEASURE OF: BREACH OF BUILDING CONTRACT. See Contracts, 1.
4. ———: BREACH OF CONTRACT TO MAKE LEASE. See Contracts, 7, 8.
5. ———: FAILURE TO DELIVER PROPERTY. See Sales, 1.

DEEDS.

1. UNDUE INFLUENCE: PRESUMPTION. Where a man over eighty years old, and of feeble mind, deeded, substantially, all of his property to his daughter, to whom alone he looked for advice, and whose control of him was absolute, and the deed was without consideration, *held*, in an action by the other heirs to set it aside, that it was incumbent upon the daughter, in order to sustain the deed, to show that it was made voluntarily, and without the exercise of any influence on her part, or in her behalf, to procure the same. (Compare *Leighton v. Orr*, 44 Iowa, 679; *Spargur v. Hall*, 62 Iowa, 498.) *Fitch v. Reiser*, 34.
2. ———. The evidence in this case (see opinion) shows that an aged and infirm woman, whose death was expected soon to occur, for no consideration except love and affection, made a deed of all her land to her children, exclusive of plaintiff, who was a daughter; that she had expressed a desire to make some provision for plaintiff, but was overborne by the influence of some of the defendants, in whose care she was, and who were at enmity with plaintiff's husband; that the deed had been prepared by some interested person a week or more before it was executed, but had never been read to or by the grantor, and that she executed it to avoid further trouble, without knowing its full contents. *Held* that it was properly set aside as being procured by fraud and undue influence. *Miller v. Murfield*, 64.
3. NO DELIVERY. A deed of land by a father to a son, executed on the same date as the father's will, and enclosed in the same envelope as the will, and never discovered, nor known to the son,

until after the father's death,—the son, in the meantime, leasing and paying rent on the very land described in the deed, was of no effect as a deed, because never delivered. *Id.*

4. QUITCLAIM : NOTICE OF PRIOR EQUITIES PRESUMED.. See Vendors and Purchasers, 8.

DEFAULTS.

See JUDGMENTS, 1, 2.

DELIVERY.

See DEEDS, 3 ; SALES, 1, 2.

DEPOSITIONS.

See CRIMINAL LAW, 6.

DISCOVERY OF PROPERTY.

See CREDITORS' BILLS ; ESTATES OF DECEDENTS, 8.

DIVORCE.

INHUMAN TREATMENT : EVIDENCE. In an action by a wife for a divorce on the ground of inhumant treatment, where the evidence showed many unseemly contentions between the parties, and that they were both more or less in fault, but fell far short of showing such inhuman treatment as to endanger plaintiff's life, *held* that a divorce was properly denied. *Edgerton v. Edgerton*, 68.

DOMESTIC RELATIONS.

1. DUTY OF PARENT TO SUPPORT CHILD : IMPLIED PROMISE TO THIRD PARTY. It is the legal as well as moral duty of parents to support their children during minority ; and, though a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon an express or implied promise to pay for the same, such promise may be inferred on the grounds of the legal duty imposed. (See opinion for citations *pro* and *con.*) *Porter v. Powell*, 151.
2. LIABILITY OF PARENT FOR MEDICAL TREATMENT OF EMANCIPATED CHILD. Defendant's daughter, at the age of fourteen, went to reside away from her father's house, at a place thirty miles distant, where for three years she contracted for, earned and controlled her own wages, and provided herself with clothing ; defendant consenting thereto, and not furnishing, nor agreeing to furnish, her with any money or means of support. While thus absent she was dangerously attacked with typhoid fever, and at her request was attended by the plaintiff, as her physician, for a period of twenty-one consecutive days, which services were rendered without the procurement, knowledge or consent of defendant. *Held* that there was a partial emancipation only, and not such a total emancipation as exempted the defendant from actual necessities furnished to his daughter ; that the services were necessary under the circumstances, and that judgment was rightly rendered against defendant therefor. (*Everett v. Sherfey*, 1 Iowa, 358, *distinguished.*) [BECK, J., *dissenting.*] *Id.*

See HUSBAND AND WIFE.

DOWER.

1. WIDOW OF "NON-RESIDENT ALIEN:" WHO IS. In section 2442, of the Code, providing that "the widow of a non-resident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from the decedent," the words "non-resident alien" mean an alien who is not a resident of Iowa, and not one who is also a non-resident of the United States. *In re Estate of Gill*, 296.
2. ———: CODE, SEC. 2442: "PURCHASER." The word "purchaser" in said section 2442 includes mortgagees; and where a non-resident alien in his lifetime mortgaged land in Iowa without release of dower by his wife, *held* that, after his death, she was entitled to dower in only so much of the mortgaged property as remained after satisfying the mortgages. *Id.*
3. RELEASE OF: MISUNDERSTANDING. A married woman who joins her husband in the execution of a bond for a deed, given in fact to secure a debt, cannot afterwards claim dower in the land upon a foreclosure of the bond, on the ground that she supposed the bond to be made in pursuance of an actual sale. *Steele v. Sioux Valley Bank*, 339.

EASEMENTS.

WHO PAYS TAXES ON. See Taxation, 1.

ELECTIONS.

See MANDAMUS, 1; SCHOOLS, 3.

EMBEZZLEMENT:

See EVIDENCE, 12.

EMPLOYER AND EMPLOYEE.

See MASTER AND SERVANT; RAILROADS, 8-10.

EQUITY.

1. RELIEF: LACHES. A party in possession of land cannot be charged with laches in neglecting to bring an action to establish his rights therein, so long as those rights are not questioned. *Devin v. Eagleson*, 269.
2. MUTUAL MISTAKE: RELIEF IN ACTION BASED ON FRAUD. See Contract, 14.
3. DISCOVERY OF PROPERTY. See Creditor's Bills, 1, 2.
4. TRESPASS: JURISDICTION. See Injunctions, 1.
5. PRIORITIES. See Mortgages, 1-3.
6. JURISDICTION: COMPLETE RELIEF. See Partition, 1, 2.
7. RELIEF AGAINST UNDUE INFLUENCE. See Deeds, 1, 2.
8. RELIEF AGAINST FRAUD. See Husband and Wife, 1; Sales, 7; Vendors and Purchasers, 1-5.

ESTATES OF DECEDENTS.

1. ANCILLARY ADMINISTRATORS: WHO ARE. Where a resident of Pennsylvania died testate in that state, owning land and personal property there, and also land in Iowa, and executors were there appointed, and creditors residing there established their claims

against the estate, and administration was afterwards taken out in Iowa at the request of the executors, to the end that the Iowa lands might be sold for the payment of the debts of the estate, *held* that the Iowa administration was ancillary to that of Pennsylvania. (See opinion for citations.) *In re Estate of Gable*, 178.

2. **PRINCIPAL AND ANCILLARY ADMINISTRATIONS: DISPOSITION OF ASSETS.** In such case all the Iowa lands were sold, producing a sum far in excess of the claims filed against the ancillary administrator, but the sale was ordered upon a petition which showed a large unpaid indebtedness against the principal administration. *Held* that it was the duty of the ancillary administrator, after paying all just claims filed against him, and the expenses of his administration, to transmit the residue of the assets in his hands to the principal administrator, to be applied upon unpaid claims in Pennsylvania, and that, while the principal administration was unable to meet the just demands against it, the heirs and legatees of the decedents were not entitled to such residue. (See opinion for citations.) *Id.*
3. **ALLOWANCE FOR SUPPORT OF WIDOW: HOW RAISED.** Under section 2375 of the Code, providing that "the court shall, if necessary, set off to the widow, and children under fifteen years of age, of the decedent, or to either, sufficient of his property, of such kind as it shall deem appropriate, to support them for twelve months from the date of his death," *held* that, if the personal property is not sufficient to cover a proper allowance, real estate may be sold for the purpose. (Compare *Estate of McReynolds*, 61 Iowa, 585.) *Newans v. Newans*, 32.
4. ——— : **WHEN JUSTIFIED.** The fact that the widow in this case had no children, and had some property in her own right, but derived but little revenue therefrom, and by no means sufficient for her support, would not justify this court in setting aside an allowance made by the court below. *Id.*
5. **ALLOWANCE TO WIDOW: ANTENUPTIAL CONTRACT.** An antenuptial contract provided that during the marriage of the parties neither should be restricted in the control or disposition of his or her property, real or personal, and that either might execute deeds of conveyance without the consent or signature of the other, the same as if unmarried; that the wife should claim no right of dower or homestead in any property of the husband's estate, in case she should survive him, but that, in that case, she should be paid a certain named annuity out of the estate. *Held* that the clause as to the right to dispose of property did not refer to or include a disposition by will, and that the contract, followed by a will in which the stipulated annuity was alone given to the widow, did not defeat her right to an allowance to a year's support, under section 2375 of the Code. *In re Estate of Peet*, 185.
6. ——— : **AMOUNT: MATTERS TO BE CONSIDERED.** An allowance for the support of the widow for one year after the death of decedent, under section 2375 of the Code, is to be made only when necessary, but the necessity is to be determined largely from the facts of each particular case; and it is proper to consider the resources of the petitioner in her own right, the extent of the estate, the demands upon it, the health of the petitioner, her station in society, and such other matters as are necessary and reasonable. In this case an allowance of eight hundred dollars to a widow without children is *held* not to be erroneous, the estate being worth thirty thousand dollars. *Id.*

7. ——— : PRIORITY OF CLAIM. It is no valid objection to making an allowance for the temporary support of a widow, under section 2375 of the Code, that the property has all been disposed of by will, which has been admitted to probate, and that, therefore, there is nothing out of which to pay the allowance ; for, when necessary to be made, it is to be paid in preference to the debts of the estate, and these are preferred to the rights of the legatees. (See opinion for citations.) *Id.*

8. DISCOVERY OF ASSETS : GIFT : EVIDENCE : ORDER. The defendants, who were the father and mother of the plaintiff's intestate, were cited, under section 2379 of the Code, to appear for examination as to the possession by them of assets belonging to the estate. Their testimony showed that the decedent died at their house, and that the night before he died he sold two horses to one P., who was the next day to give his notes for the price, to-wit, one note for one hundred and fifty dollars and one for fifty dollars. He took one of the horses that night, and the next morning, the decedent having died during the night, he took the other horse, and left with the father the notes which he was to give, and afterwards paid to the father the amount of the fifty-dollar note. The larger note and the money the father admitted he still had, but he claimed that they belonged to his wife pursuant to an oral direction of the son, that when the notes came in the morning they should be hers. *Held* that, as the intended gift, as alleged, was not consummated by possession during the life of the son, it was void, and the court properly ordered the defendants to deliver the property to the plaintiff ; but a further order, that upon failure so to do they should be imprisoned, is modified so as to apply only to such of them as, having the power to deliver the property, shall refuse so to do. *Donover v. Argo*, 574.

9. CLAIMS : LIMITATION : EQUITABLE RELIEF : MODE OF TRIAL. Where a claimant of the fourth class seeks to prove his claim against the estate of a decedent more than twelve months after notice of administration, the court should first determine whether the circumstances are such as, in equity, should remove the bar of the statute (Code, sec. 2421), and, if so, the issues of fact arising by operation of law should be submitted to a jury, unless a jury is waived. (See *Ingham v. Dudley*, 60 Iowa, 22.) *Lamm v. Sooy*, 598.

10. BELATED CLAIMS : EQUITABLE RELIEF. The decedent in this case was surety on one note, and the guarantor of others, and all the notes belonged to plaintiff, and he filed his claims based thereon against the administrator after six, but within twelve, months of the publication of the notice of administration. He did not file his petition for proving up the claims until after the twelve months had expired, and, to take the case out of the special statute of limitations (Code, sec. 2421), he showed that the delay was caused by an effort on his part to make the claims out of the principal debtors, against whom he had proceeded with all possible dispatch, but with only partial success, and that he filed his petition to prove up the claims as soon as he knew that they had not been allowed. The estate was unsettled, and it did not appear that it was prejudiced by the delay in prosecuting the claims. *Held* that the court rightly adjudged plaintiff to be entitled to equitable relief as against the bar of the statute. *Id.*

11. CLAIM FILED TOO LATE : JURISDICTION. The fact that a claim against an estate is filed more than a year after the publication of notice of administration does not affect the jurisdiction of the court to allow or reject it. *McLeary v. Doran*, 210.

12. **PROOF OF CLAIMS: NOTICE WAIVED BY APPEARANCE.** The allowance of a claim against an administrator cannot be assailed on the ground that he was not notified of the hearing, where it appears from the record that he was present and had an exception entered to the order, and his subsequent report shows that he employed counsel and resisted the claim. *Id.*
13. **ALLOWANCE OF CLAIM: HOW FAR BINDING UPON HEIRS.** Where a claim has been adjudicated against an administrator, it is so far binding upon the heirs that they cannot have the allowance set aside, as against the claimant, by exceptions to the administrator's report. If the administrator has been guilty of maladministration in allowing a claim, or colluding with a claimant, the heirs may have recourse against him and his sureties. (*Dessaint v. Foster*, 72 Iowa, 639, *distinguished.*) *Id.*
14. **WIDOW IS NOT HEIR.** See Insurance, 5.
15. **LEGATEES CHARGED WITH TRUSTS: REMOVAL BY COURT.** See Trusts, 1.

ESTOPPEL.

See CORPORATIONS, 2; HIGHWAYS, 8; PROMISSORY NOTES, 2; SURETIES, 4; TAXATION 2,.

EVIDENCE.

1. **CONFLICT: WHAT CONSTITUTES: PROVINCE OF JURY.** It is not essential to a conflict of evidence that the testimony shall come from opposing sides; but if the statements and facts in evidence are such that they lead the mind to opposite conclusions as to a particular fact in issue, then there is a conflict of evidence, and its reconciliation, in a law action, is the peculiar province of the jury, or of the trial court, where the trial is to the court without a jury, and this court will not interfere. Accordingly, where a transfer of personal property from father to son had the effect to defeat the father's creditors, who challenged the validity of the transfer, and the testimony of the members of the family was all designed to sustain it, but in fact showed a very loose transaction, which might be consistent with an honest intention, but such as is often engaged in between members of a family to defeat creditors, *held* that there was a conflict of evidence, though the testimony was not contradicted. *Saar v. Finkin*, 61.
2. **———: CIRCUMSTANCES TO BE CONSIDERED.** It is the duty of courts and juries to consider the reasonableness of the testimony of witnesses, and to weigh probabilities founded upon circumstances surrounding the transaction in dispute, and to apply the common experience of mankind, in determining questions of fact. And so, in an action for the killing of horses upon a depot ground by the alleged running of a train at an unlawful speed in excess of eight miles per hour, where one witness testified that the train in question crossed the ground at the rate of twenty-five miles per hour, but four trainmen and the night operator at the depot all testified positively that the speed did not exceed eight miles per hour, but the one witness was strongly corroborated by the physical circumstances connected with the casualty, and which were plainly visible after the accident, *held* that a verdict based upon the truthfulness of his testimony could not be disturbed on appeal for want of evidence to sustain it. *Story v. Chicago, M. & St. P. Ry. Co.*, 402.

3. **OF AGENCY: WHEN NOT ADMISSIBLE.** One who has contracted as a principal cannot, when sought to be held upon the contract, be permitted to show that he was only an agent, where he does not propose to show that the other party knew of such agency at the time of contracting. *Blackmore v. Fairbanks*, 282.
4. ———. Where a witness was examined as to his actual authority as defendant's agent, and he stated that he was such agent, and had his authority in writing in his pocket, the writing was the best evidence, and his oral testimony was properly excluded. *Lee v. Agricultural Ins. Co.*, 379.
5. **PROCEEDINGS OF BOARD OF SUPERVISORS.** The fact that no proceedings on a certain point were had by the board of supervisors is not a matter of record, and may be shown by the testimony of the county auditor, if he knows the fact. *Ida County v. Woods*, 148.
6. **CONSPIRACY: DECLARATIONS OF CO-CONSPIRATOR: INSTRUCTION.** In an action against defendant to recover money alleged to have been obtained by him through a conspiracy with one K., the court instructed: "If you find from the evidence * * * that the defendant and K. were engaged in a conspiracy * * * then the declarations and statements made by K., and admitted in evidence, may be taken into consideration by you, in connection with all the other facts and circumstances proved on the trial." *Held* erroneous, because it did not limit the jury to such declarations only as were made by the alleged co-conspirator while the conspiracy was in progress, and in furtherance of its objects. And, since the only evidence as to the amount of money which defendant had thus obtained was the declarations of K., which the evidence tended to show were made when the conspiracy was at an end, and not in furtherance thereof, the error was prejudicial, and ground for reversal. (See opinion for citations.) *Taylor County v. Standley*, 666.
7. **CONTRACTS: CONSIDERATION: PAROL TO VARY WRITING.** Parol evidence is never admissible to alter, vary or contradict a written contract, but it is admissible to show what the consideration was, unless the consideration is expressed in the instrument in such unmistakable language that parol evidence is not necessary to understand it. But where several instruments constituted parts of one transaction, and were to be considered together as such, and each instrument taken separately clearly expressed the consideration for which it was made, but when taken together as parts of the same transaction it did not clearly appear what the consideration was, *held* that parol testimony was admissible to show the real consideration. (See opinion for citations and for application of the rule.) *First Nat. Bk. of Grundy Center v. Snyder*, 192.
8. **PAROL TO EXPLAIN WRITING: SALE: AGENCY.** Plaintiff's agent orally offered to sell defendant ten carloads of "Star Poplar" lumber at a certain price. He knew the purpose for which the defendant wanted the lumber, and was informed that nothing but dry lumber would answer, and he represented that the grade known as "Star Poplar" would meet the requirement. "Star Poplar," however, was a grade that might be either green or dry. Afterwards, defendant wrote to plaintiff, stating the offer of the agent to furnish "Star Poplar," and accepting the offer, but saying nothing about the lumber being dry,—supposing, from the agent's statement, that that grade was always dry. After some hesitation plaintiff agreed by letter to furnish the lumber at the price named by the agent. Some of the lumber shipped was not dry, and defendant refused to receive any more of it. In an action

for the price, *held* that, while the contract, as evidenced by letters, was for "Star Poplar," which might be either green or dry, plaintiff was bound by the agent's representations that it was dry; and evidence of what the agent said was competent to show the kind of lumber which defendant had contracted for. (See opinion for citations.) *St. Louis Refrigerator Co. v. Vinton Wash. Mach. Co.*, 240.

9. **THE SAME: ESTOPPEL.** In such case, defendant was not estopped to deny that its letter expressed the whole contract as to the character of the lumber, though it omitted to say that it was to be dry; because plaintiff, by its authorized agent, had given defendant to understand that the expression "Star Poplar" always meant dry lumber. *Id.*
10. **PAROL TO CONTRADICT BILL OF LADING.** A bill of lading is both a receipt and a contract (*Garden Grove Bank v. Railway Co.*, 67 Iowa, 526), and as a receipt it may be contradicted by parol as to the number of articles received, and especially where it states the number as so many "more or less." *Chapin v. Chicago, M. & St. P. Ry Co.*, 582.
11. **WRITING: GENUINENESS CHALLENGED: CONTENTS.** Where defendant relied upon a written instrument purporting to be made by plaintiff, but the genuineness of which plaintiff questioned, evidence of the contents of the instrument was properly excluded in the absence of any attempt or offer to prove its genuineness. *Bray v. Flickinger*, 313.
12. **EMBEZZLEMENT.** In an action to recover of an officer money alleged to have been embezzled, evidence that he had money on deposit in a bank, to his credit officially, at the time of the alleged embezzlement, is not admissible to negative the alleged embezzlement. *Ida County v. Woods*, 148.
13. **LOST DRAFT.** In an action for the value of a lost draft, the evidence (see opinion) is considered, and *held* to establish, without conflict, that the draft was drawn and delivered to plaintiff, and by him sent by mail to another, who never received it; that it was lost in the mail, and was never paid to any one, though seven years had elapsed; and, upon this uncontradicted evidence, *held* that plaintiff was entitled to judgment. *Lindsey v. Le Mars Bank*, 607.
14. **POWER OF ENGINE: COMPETENCY.** Where the power of an engine with which plaintiff had tried to run his mill was material, it was competent for a witness who had been engaged in operating the mill to testify to its power as compared with that of three water-wheels, of known power, by which the mill had been run. *Blackmore v. Fairbanks*, 282.
15. **RECOMMENDATION TO CREDIT: WHEN IMMATERIAL.** It was immaterial what, if any, recommendation plaintiff gave of one of whom defendant took a chattel mortgage, in the absence of any offer to show that defendant knew of or relied on such recommendation. *Bray v. Flickinger*, 313.
16. **RECORD OF TESTIMONY AT FORMER TRIAL.** The record of the testimony of witnesses at a former trial is admissible in a subsequent trial of the case, where the witnesses reside in a county of the state other than that in which the trial is pending. (See opinion for statutes and cases cited.) *Bank of Monroe v. Gifford*, 300.
17. **COPIES OF MORTGAGE RECORDS.** Duly authenticated copies of the record of mortgages and conveyances are admissible as tending to show the insolvency of the grantor therein. *Id.*

18. **RECORDS OF DEEDS WITHOUT REVENUE STAMPS.** The record of a deed executed when revenue stamps were required to be affixed to deeds is admissible in evidence, even though the record does not show that revenue stamps were affixed to the original deed; for, in the absence of a contrary showing, that will be presumed, since it was the duty of recorders to refuse to record such instruments until the proper stamps were affixed, and he was under no obligation to copy or refer to the stamps in the record. (This point elaborated and affirmed in opinion on rehearing.) *Collins v. Vallean*, 626.
19. **RECORD OF CERTIFIED COPY OF RECORD.** A power of attorney was originally filed and recorded in Woodbury county, to which O'Brien county was at the time attached. Afterwards a certified copy of the record in Woodbury county was recorded in O'Brien county. *Held* that the record in O'Brien county was admissible in evidence without a showing that it was the same as the record in Woodbury county; for that will be presumed, in the absence of evidence to the contrary. *Id.*
20. **DOCUMENTS NOT FILED AS PER ORDER.** Where in an equity case there was an order that the oral evidence should be taken in the form of depositions, and all documentary evidence filed with the clerk before trial, it was not error to admit documentary evidence not so filed; but, if the adverse parties were taken by surprise, they would have been entitled to a continuance upon application therefor. *Id.*
21. **OBJECTION TOO LATE : NO PREJUDICE.** In an action for breach of warranty in the sale of machinery, plaintiff, in his examination in chief, stated that he had received from defendants a plan for setting it up, and in answer to the question, "was it erected according to that plan?" he said "yes." Defendants then objected to the question on the ground that plaintiff should show the plan, and how the machinery was erected. *Held*—
 - (1) That the objection to the question was too late after it had been answered.
 - (2) That, even if the objection were made in time, the ruling was without prejudice, since defendants made no attempt to show, by cross-examination or otherwise, that plaintiff had deviated from the plan. *Blackmore v. Fairbanks*, 282.
22. **OBJECTION WITHOUT GROUND STATED.** A court is not obliged to sustain an objection to evidence when no ground for the objection is stated, even though a sufficient ground exists. *Id.*
23. **OBJECTIONS : ONLY STATED GROUNDS CONSIDERED.** Where a party objects to evidence upon certain grounds which are not well taken, it is not error for the court to overrule the objection, though a good ground for the objection may exist. *Id.*
24. **ERROR WITHOUT PREJUDICE.** If it be admitted that the court erred in admitting testimony in this case, yet it appears that such errors were without prejudice, and therefore no ground for reversal, because, upon the evidence properly admitted, the judgment could not legally have been different from what it was. *Rosenthal v. Miller*, 130.
25. **ERROR CURED BY SUBSEQUENT RECORD.** Error in refusing to strike out immaterial testimony is no ground for a reversal, where it appears from other testimony in the case and the finding of the court thereon that the error worked no prejudice to the appellant. *Rappleys v. Cook*, 564.

26. **OPINIONS : WITNESS NOT SHOWN TO BE QUALIFIED.** The opinions of a witness are properly excluded where the witness is not shown to be qualified to give an opinion on the point in question. *Lee v. Agricultural Ins. Co.*, 379.
27. **EQUITABLE ISSUE IN LAW ACTION : APPEAL.** Where in a law action an equitable issue arises, and it is tried by the court without a jury, and the evidence on such trial is equally balanced, the party who has the burden of proof must fail, and he cannot in this court ask that on that issue evidence introduced in trial of the other issues before the jury be considered. *Hall v. Horton*, 352.
28. **PAROL TO VARY TERMS OF BAIL BOND.** See Criminal Law, 22.
29. **DYING DECLARATIONS.** See Criminal Law, 54-56.

FOR EVIDENCE ON PARTICULAR SUBJECTS, see appropriate titles

EXECUTIONS.

1. **SUPPLEMENTARY PROCEEDINGS : PARTIES.** Sections 3135 to 3149 of the Code, providing for an examination of a judgment debtor for the discovery of his property, do not contemplate or authorize the examination of third parties; and where the wife of the judgment debtor was in such proceedings cited to appear and was examined, and the debtor was, as the result of the examination, adjudged to be the owner of certain property which was in the possession of the wife, and which she claimed to be her own, such judgment, and an order that the debtor turn it over to satisfy the judgment, were of no effect upon the wife, as she was not a party to the proceeding, and could not be bound thereby. *Osborne v. Reardon*, 175.
2. **ISSUANCE AFTER DEATH OF JUDGMENT DEBTOR : SALE VOID.** The right of a judgment creditor to issue an execution against the property of his debtor terminates with the death of the debtor, whether the judgment be *in personam* or *in rem*, and a sale and deed made in pursuance thereof are void; and the fact that the property levied on under the execution is already held by the sheriff under a writ of attachment, levied before the death of the judgment debtor, will not affect the rule. (See Code, sec. 3133, and cases cited in opinion.) *Bull v. Gilbert*, 547.

EXEMPTIONS.

See HOMESTEADS, 4; PENSIONS, 1.

FALSE PRETENSES.

See CRIMINAL LAW, 26-28

FALSE REPRESENTATIONS.

1. **INSTRUCTIONS.** In an action for false representations, the court instructed the jury that if they found that defendants made false representations to the effect complained of * * * their verdict should be for plaintiffs. *Held* not erroneous on the ground that it was not limited to the representations testified to by plaintiffs. *Phelps v. James*, 262.
2. **EXCHANGE OF LANDS : CONTRACT.** Plaintiffs and defendants exchanged lands under a written contract containing a stipulation that the exchange was made without regard to the valuation of the lands. *Held* that if this provision bound the parties to take the lands as they were, regardless of what they were represented to be, still either party would be liable to the other for false and fraudulent representations with regard to the value and character of the lands conveyed by him, which induced the other to enter into the contract. *Id.*

8. **INSTRUCTIONS: QUESTION FOR JURY.** In such case the court instructed: "If the defendants * * * did not know the condition of said land, it was their duty to remain silent, and it would be a false representation if said defendants delivered said so-called guaranty as a true description of said land, even though they did not in fact know said description to be false." *Held* erroneous, in that it alleged as a matter of fact that the representations by means of a guaranty given in evidence were false,—that being a question for the jury. *Id.*
4. ———: **KNOWLEDGE OF FALSITY.** To render one liable for false representations, not only the falsity of the representations, but his knowledge thereof, must be proved, and instructions given in this case were erroneous for holding otherwise. (See opinion for citations.) *Id.*
5. **GIST OF ACTION: SCIENTER: ACTIONS AT LAW AND IN EQUITY.** The gist of liability for damages for false representations is that an intentional wrong has been committed to the injury of another; the wrong being in representing as true that which is known to be false, as an inducement to the other to act to his injury. And in actions in equity, as well as at law, there can be no recovery on the ground of false and fraudulent representations, unless it be shown that the party making the representations knew them to be false, or that he made them under circumstances from which such knowledge will be inferred. *Hubbard v. Weare*, 678.
6. **BY OFFICERS OF CORPORATION AS TO ITS CONDITION: PRESUMPTION.** Before officers of a corporation make representations of its condition, as an inducement to others to take stock therein, it is their duty to use reasonable diligence to know that the representations are true; and they will be presumed to have used such diligence, and to possess the knowledge which its exercise would bring to them. *Id.*
7. **STATEMENTS MADE UPON ALLEGED PERSONAL KNOWLEDGE: ESTOPPEL.** A person making a false representation as true to his personal knowledge will not be heard to say that he did not have knowledge that it was false. *Id.*
8. **BY OFFICER OF CORPORATION TO SELL STOCK: INTENTIONAL WRONG.** Where an officer of a corporation, to induce others to take stock therein, makes material representations as to its financial condition which he knows to be false, yet with the confident belief that the corporation will soon be as represented, and that no loss will follow, commits an intentional wrong, for which he is liable. *Id.*
9. **BY OFFICER OF CORPORATION TO SELL STOCK TO STOCKHOLDER.** Where the president of a corporation knowingly makes to a stockholder, who is not familiar with the condition of the company, false representations in regard thereto, showing the company to be prosperous when it is not, and thereby induces such stockholder to take and pay for more stock, he is liable in damages for the wrong done. *Id.*
10. **BY PRESIDENT OF CORPORATION TO VICE-PRESIDENT AND DIRECTOR TO OBTAIN CREDIT.** A stockholder in a corporation, who is also its vice-president and a director, will be presumed to know the condition of the company, especially where there has been a special investigation thereof, and its losses have been ascertained, and a committee has reported that dividends previously declared were fictitious; and where, under such circumstances, he indorses for the company, it will be presumed that he does so, not relying upon

any false representations made to him by its president as to its prosperous condition, but with the hope of saving it from bankruptcy; and he cannot recover of the president for loss incurred thereby. *Id.*

11. **THE SAME.** Where the vice-president and director in such case made a loan to the corporation after all its personal property had been mortgaged, of which mortgage the evidence shows he had knowledge, he cannot recover the amount loaned, from the president of the company, on the ground that the latter induced him to make the loan by falsely representing that the company had a large amount of property on hand from which could be realized the money to pay the loan. *Id.*
12. **BY PRESIDENT OF CORPORATION TO SELL STOCK : AGENCY.** Where the president of a corporation makes false representations to the agent of other persons, knowing them to be false, with the intent to induce such persons, or persons generally to whom the representations may be communicated as true, to take stock in the company, and they, relying thereon, do so to their injury, he is liable the same as if he had made the representations to the parties in person. *Id.*

FENCES.

See RAILROADS, 20, 21.

FIRE INSURANCE.

See INSURANCE, 1, 2.

FORCIBLE DEFILEMENT.

See CRIMINAL LAW, 29-31.

FORMER ADJUDICATION.

WHEN PARTIES NOT BOUND. Where certain parties to a cause have at the time no interest in a portion of the decree rendered therein, they are not in a subsequent action bound by such portion, even though they do not appeal therefrom; for they have no occasion to appeal. *Pierce v. Early*, 199.

FRAUD.

1. **ACTION BASED ON : RELIEF ON GROUND OF MISTAKE.** See Contracts, 14.
2. **IN PURCHASE OF GOODS : RESCISSION.** See Sales, 7.
3. **IN EXCHANGE OF LANDS.** See Vendors and Purchasers, 1-5.

See FALSE REPRESENTATIONS; FRAUDULENT CONVEYANCES.

FRAUDULENT BANKING.

See CRIMINAL LAW, 32-41.

FRAUDULENT CONVEYANCES.

1. **HUSBAND AND WIFE : EVIDENCE.** Defendant held the title to a farm which had been paid for in part with his wife's money, and which they contracted to sell on certain terms, but the sale was not to be consummated until a subsequent date. Prior to that date they made and recorded a deed to the purchaser without his knowledge; but he accepted the conveyance and paid for the land.

With a portion of the purchase money the wife bought other land, taking title to herself. A few days prior to the making of the voluntary deed, defendant was sued by plaintiff, and judgment was afterwards obtained against him. The wife did not know that he was indebted, and knew nothing of plaintiff's claim until after the first farm had been sold and paid for; and she contracted for the second one, and made a payment thereon, some months before the action was brought against defendant. *Held* that, though there is some evidence of a fraudulent intent upon defendant's part in making the voluntary deed, there is nothing to show that the wife participated therein; and, having purchased the second farm with her share of the proceeds of the first one, she was properly adjudged to hold it free from liability for the plaintiff's judgment. *Deering v. Lawrence*, 611.

2. TO DEFEAT MARITAL RIGHTS. See Husband and Wife, 1.

GAMBLING.

See CONTRACTS, 11, 12; CRIMINAL LAW, 42.

GIFTS.

See ESTATES OF DECEDENTS, 8; SPECIFIC PERFORMANCE, 1.

GRAND JURY.

See CRIMINAL LAW, 5.

HIGHWAYS.

1. ESTABLISHMENT: NOTICE: JURISDICTION: PRESUMPTION. Under section 519 of the Code of 1851, providing that "previous to the presentation of a petition for the establishment of a county road four weeks' notice thereof must be given by being posted up" at certain named places, an affidavit of the petitioner, attached to a copy of the notice on file with the papers, stating that he posted the notices at the required places, but failing to state the time of posting, was not sufficient to give the county court jurisdiction to establish the road. And since the record of the court in the case contained this recital: "Affidavit of J. T. (the petitioner), signed and sworn to, of posting up notices according to law, and filed with the papers," *held* that no presumption could be entertained, from the fact that the court assumed jurisdiction, that it had before it other evidence that the notices were posted in due time; for when a court undertakes to state the evidence on which its jurisdiction rests it will be presumed that it states it all. (See opinion for citations.) *State v. Waterman*, 360.
2. ———: NOTICE: SUFFICIENCY: SERVICE: EVIDENCE. In such case, where the validity of the establishment of the alleged highway was in question, the testimony of the petitioner that he posted the notices in the time required by law was immaterial, since the notice itself was fatally defective in not stating the time when the petition would be presented. *Id.*
3. DEDICATION BY MISTAKE: ESTOPPEL. Where the owner dedicates land for a highway under a mistaken belief that it is a legal highway, and it is accepted as such, and expense is incurred by others upon the faith of the dedication, it is binding on the land-owner. (See *Marratt v. Deihl*, 37 Iowa, 250.) *Id.*
4. VOID PROCEEDINGS TO ESTABLISH: TITLE BY PRESCRIPTION. While title by prescription cannot be acquired by the public to land used as a highway under a mistake of fact on the part of the public and the land-owner as to the true location of the highway (see

opinion for citations), yet where it is so used in mutual reliance upon proceedings establishing the highway, which are afterwards found to be void, such mistake is one of law, and such use is based on color of title, and after ten years it ripens into title by prescription. (See *Railway Co. v. Allfree*, 64 Iowa, 503, and *Colvin v. McCune*, 89 Iowa, 504.) *Id.*

5. **TITLE BY PRESCRIPTION.** The mere use by the public for highway purposes of land supposed to lie along a section line, but which, by mistake, does not so lie, does not give title by prescription. In order to have that effect, the use must correspond with the claim of right. (Compare *State v. Welpton*, 84 Iowa, 144.) *Bolton v. McShane*, 26.

HOMESTEADS.

1. **ABANDONMENT: FACTS CONSTITUTING.** In this action to set aside a sheriff's sale of real estate on the ground that it was plaintiff's homestead, it appears that plaintiff ceased to occupy the property as a home about three years before the sale; that he directed the sheriff to levy on the property and sell it on execution; that he did not commence this action until about five years after the sale; and that the purchaser collected the rents for at least a portion of that time. *Held* that these facts, in connection with the fact that plaintiff and his wife established their home at another place before he commenced this action, constituted a clear case of abandonment, and justified a decree against him. The facts that when plaintiff removed from the house he left some carpets, window shades and the like, therein, and that three years after the sale he filed a claim of homestead in the property, and that he testified that he did not intend to abandon it, could not overcome his acts and declarations tending to show an abandonment. *Wilson v. Daniels*, 132.
2. **JOINT TENANCY: CONVEYANCE: VALIDITY: WHO MAY QUESTION: INNOCENT PURCHASER.** The real estate in controversy was owned jointly by P. and his son, and was occupied by P., who was a married man, as his homestead. While so occupied P. and his son conveyed it to P.'s daughter, but P.'s wife did not join in the deed. After the death of both P. and his wife, the daughter conveyed to plaintiff. P.'s heirs always regarded these conveyances as valid. Prior to the conveyance to plaintiff, defendants procured a judgment against two of the sons of P. Plaintiff, when he took his conveyance, knew of this judgment, and also knew of the occupancy of the premises by P. as his homestead up to the time of his death. *Held*—
 - (1) That, while P. was only a joint tenant, his occupancy of the premises as such gave him a homestead right therein. (See *Thorn v. Thorn*, 14 Iowa, 53; *Wertz v. Merritt*, 74 Iowa, 686.)
 - (2) That the failure of P.'s wife to join in the deed to the daughter made the deed of no effect so far as P.'s undivided interest was concerned. (See Code, sec. 1990, and citations in opinion.)
 - (3) That, though P.'s heirs did not question that conveyance, defendants had the right to do so, if they were interested as judgment lien-holders.
 - (4) That, since the conveyance was a nullity as to P.'s undivided interest, that interest descended, upon the death of his wife and himself, to his children, and defendant's judgment became a lien on the shares of the two sons who were judgment debtors, and they were properly sold on execution thereunder.

- (5) That plaintiff, with the knowledge he had when he purchased, could not claim priority over defendants on the ground that he was an innocent purchaser, under the rule of *Lunt v. Neeley*, 67 Iowa, 98. *Bolton v. Oberne*, 278.
3. CONVEYANCE: ORAL AGREEMENT FOLLOWED BY CHANGE OF POSSESSION: RESCISSION. Where a father, with the consent of his wife, orally, and for a valuable consideration, gave to his son a tract of land which included the homestead, and the son took possession thereof and for a long time treated it in all respects as his own, and the transfer was regarded by all concerned as a completed transaction, except as to the legal title, which it was designed to perfect by means of the father's will, and a will was executed for that purpose, but after the son's death the father, by a codicil, revoked that part of his will, *held* that the equitable title was in the widow and heirs of the son, as against the executor of the father, who sought to sell it and to divide the proceeds under the terms of the codicil. (As to the transfer of the homestead by verbal agreement, compare *Drake v. Painter*, 77 Iowa, 731.) *Winkleman v. Winkleman*, 319.
4. DESCENT: EXEMPTION FROM DEBTS OF HEIRS. Where an owner of land, including his homestead, dies, leaving a widow and heirs, and an action is brought to partition the land, and actual partition cannot be made, but it is sold and the proceeds divided, the widow is entitled to one-third of the whole, and judgment creditors of the heirs have no right, upon intervention, to demand that the widow's share be paid exclusively out of the proceeds of the homestead, and the interests of the heirs in the proceeds of the homestead are exempt from liability for their debts contracted prior to the death of their father. (See Code, sec. 2008.) *Kite v. Kite*, 491.

HOMICIDE.

See CRIMINAL LAW, 50-56.

HOUSES OF ILL-FAME.

See CRIMINAL LAW, 43-46.

HUSBAND AND WIFE.

MARITAL RIGHTS: CONVEYANCE IN FRAUD OF: EVIDENCE. The defendants are mother and son. The son, having got plaintiff with child, and fearing that he would be obliged to marry her to avoid a prosecution for seduction, secretly conveyed all his property, consisting of chattels only, to his mother. The bill of sale was made without the knowledge of the mother, and expressed a consideration of "one dollar and love and affection," and was left with the son's attorney, to be delivered, as it would seem, in case the son married the plaintiff; otherwise not. The third day after it was executed the son did marry the plaintiff, and the next day he abandoned her and absconded, and the day after that the bill of sale was delivered to the mother. The mother knew beforehand of the son's trouble with plaintiff; and when she received the bill of sale she knew that he had married plaintiff and had absconded. Although there was some evidence tending to show that the real consideration for the bill was a debt owing by the son to the mother, the existence of such debt is not satisfactorily established, and, upon consideration of all the evidence (see opinion), *held* that the bill of sale was made with the fraudulent

intent to defeat plaintiff of her marital rights, and that the mother was charged with notice of such intent when it took effect as between herself and her son,—that is, when it was delivered to her and accepted by her,—and that she was properly adjudged to hold the property in trust for the plaintiff. (Compare *Gainor v. Gainor*, 26 Iowa, 337.) *Beere v. Beere*, 555.

See FRAUDULENT CONVEYANCES, 1.

INDICTMENT.

See CRIMINAL LAW, 24, 26, 29, 43, 48, 50, 51, 53, 60.

INFORMATION.

SUFFICIENCY : AMENDMENT. See Criminal Law, 3, 4.

INJUNCTIONS.

1. TRESPASS : GROUND OF EQUITABLE JURISDICTION. Where defendants falsely claimed that there was a highway across plaintiff's land, and repeatedly tore down his fences and passed over his premises, and threatened to continue to do so, *held* that equity would enjoin the repetition of the trespass, in order to avoid a multiplicity of suits, regardless of the solvency of the defendants, or other grounds of equitable interference. (See opinion for citations.) *Ladd v. Osborne*, 93.
2. TO PREVENT CITY FROM UNLAWFULLY DISPOSING OF PUBLIC PROPERTY. See Cities and Towns, 2-4.

INNOCENT PURCHASERS.

See HOMESTEADS, 2 ; NEGOTIABLE INSTRUMENTS, 2.

INSOLVENCY.

EVIDENCE OF. See Criminal Law, 34-38, 41.

INSTRUCTIONS.

1. TO BE CONSIDERED TOGETHER : BURDEN OF PROOF. An instruction in this case, which might be construed as wrongfully placing the burden of proof on defendant, is no cause for a reversal, since other parts of the charge clearly placed the burden on plaintiff. *Neville v. Chicago & N. W. Ry. Co.*, 232.
2. ——— : CONFLICT. An instruction to find for plaintiff upon finding certain enumerated facts, but which ignores a fact necessary to be found in order to justify a verdict for plaintiff, is not cured by another instruction from which the jury might infer the necessity of the ignored fact ; nor even by an instruction which makes the finding of that fact necessary ; for then the instructions are in conflict, and it cannot be known which one the jury followed. (See opinion for illustration.) *Id.*
3. ASSUMPTION OF FACT IN DISPUTE. It is error in an instruction to assume as a fact a material matter which the evidence has left in doubt. *Id.*
4. STATING ISSUES. The court instructed : "You will observe that the defendants do not deny that the plaintiff did sell the number of brick claimed, and at the price claimed." Defendants did not in their answer admit the price, but there was no controversy on the trial, and no conflict in the evidence, in regard to the price. *Held* that, as applied to the entire case, the instruction was correct. *Fleming v. Stearns*, 256.

5. **ORALLY DIRECTING VERDICT.** A direction to the jury to return a verdict for defendant upon plaintiff's evidence, upon motion to that effect, is not in the nature of an instruction, and is not, therefore, within the provision of section 2784 of the Code, requiring instructions to be in writing. (See *Milne v. Walker*, 59 Iowa, 186, and *Stone v. Railway Co.*, 47 Iowa, 82.) *Young v. Burlington Wire Mattress Co.*, 416.
6. **COMPREHENSIVENESS OF.** It is not the office of a single instruction to embrace all the elements of defense, especially where the case is complicated, as indicated by the fact that the defendant has asked the court to give nineteen instructions on its behalf. It is sufficient if all the points in the case are fairly presented in the whole charge taken together. *Chapin v. Chicago, M. & St. P. Ry. Co.*, 582.
7. **TOO FAVORABLE TO APPELLANT.** Though an instruction is erroneous, it is no ground for reversal if the error is in favor of the appellant. *Id.*
8. **ERROR WITHOUT PREJUDICE.** An instruction which submits a question not in issue is erroneous, but where, in view of the evidence, the error is against plaintiff only, defendant cannot complain. *Hall v. Horton*, 352.
9. **TAKING ISSUE FROM JURY.** It is proper for the court to take from the jury an issue raised by a defense which there is no evidence to support. *Beard v. Illinois Cent. Ry. Co.*, 518.
10. **FOR INSTRUCTIONS IN CRIMINAL CASES,** see Criminal Law, *passim*.

FOR INSTRUCTIONS ON PARTICULAR SUBJECTS, see appropriate titles.

INSURANCE.

(1) *Fire Insurance.*

1. **FAILURE OF AGENT TO REPORT RISK : DAMAGES : PROXIMATE CAUSE : EVIDENCE.** Defendant was plaintiff's agent, authorized to issue policies, but charged with the duty of promptly reporting risks taken. Defendant issued a policy, but neglected to report the same to plaintiff, as was his duty, and plaintiff did not know of the risk until after the insured property had been consumed by fire. Plaintiff paid the loss, as it was legally bound to do, and in this action it seeks to recover the amount of defendant on the ground of his negligence. *Held* that it was competent for plaintiff to introduce evidence tending to show that if defendant had duly notified it of the risk it would have cancelled the policy before the fire, as it had the right to do, and thus avoided the loss; because, if it could establish that fact, it would appear that defendant's negligence was the proximate cause of plaintiff's damage, and defendant would be liable therefor. (See opinion for citations.) *State Ins. Co. v. Jamison*, 245.
2. **INCREASE OF RISK BY MORTGAGE.** The mortgaging of insured property, even to secure a debt not due, is an increase of the risk, and there was no error in refusing to submit to the jury in this case the question whether it was or not. (*Russell v. Insurance Co.*, 71 Iowa, 69, *distinguished*.) *Lee v. Agricultural Ins. Co.*, 379.

(2) *Life Insurance.*

8. **MUTUAL ASSESSMENT PLAN : NECESSITY OF ATTACHING APPLICATION TO POLICY.** Laws of 1880, chapter 211, section 2, requiring applications and representations upon which policies are issued to be attached to or indorsed on the policies, and providing that an

omission so to do does not invalidate the policy, but precludes the company from pleading or proving the falsity of the representations, applies to mutual life insurance companies on the assessment plan, although neither that nor any similar provision is found in Laws of 1886, chapter 65, which regulates mutual benefit associations. (Compare *Cook v. Federal Life Ass'n*, 74 Iowa, 746.) *McConnell v. Iowa Mut. Aid Ass'n*, 757.

4. ACTION ON POLICY : LIMITATION BY TERMS OF POLICY. The policy sued on in this case required proofs of death to be filed within sixty days, and action on the policy to be commenced within six months, after the death of the assured, and it provided that payment should be made within forty-five days after the filing of such proofs. *Held* that, even if defendant's denial of liability immediately after the death of the assured was a waiver of such proofs, a right of action did not accrue until the expiration of the forty-five days, and that an action commenced within six months after that time was not too late. *Id.*
5. PAYABLE TO "LEGAL HEIRS:" WIDOW NOT AN HEIR. Where a decedent left a widow and one child, and also a life insurance policy payable to his "legal heirs," *held* that the widow was not included in the term "legal heirs," and that the whole amount of the policy was payable to the guardian of the child. (See opinion for meaning of word "heirs" in this state.) *Phillips v. Carpenter*, 600.

INTOXICATING LIQUORS.

1. DISPENSATION BY PHYSICIAN TO PATIENT : NUISANCE. A practicing physician has no right, by virtue of his profession, to dispense intoxicating liquors to his patients for the purposes of medicine, unless he holds a permit to deal in such liquors ; and for so doing he is liable to indictment and punishment for nuisance the same as any other person. *State v. Benadom*, 90.
2. LIQUOR NUISANCE : ELEMENTS OF CRIME : INSTRUCTION : ERROR WITHOUT PREJUDICE. In a prosecution for keeping a liquor nuisance, an instruction which ignores the fact that, to constitute the crime charged, the existence of intoxicating liquors in the place described is essential, is erroneous (*State v. Tierney*, 74 Iowa, 238) ; but such error is without prejudice where it is clearly shown in the evidence, and not questioned, that such liquors were kept in the place named. *State v. Shank*, 47.
3. ——— : REGISTERED PHARMACIST : PRESUMPTION FROM LIQUORS FOUND ON PLACE. The finding of intoxicating liquors in the place named in an indictment for liquor nuisance is presumptive evidence that they were kept for unlawful sale (Laws of 1886, ch. 66, sec. 8) ; but the presumption is not conclusive ; and where the defendant claimed to be a registered pharmacist he was entitled to rebut the presumption by showing that fact to explain the purpose for which he had the liquors. The instructions in this case, taken together, sufficiently state this rule, and are not erroneous. *Id.*
4. ——— : ——— : AMOUNT OF LIQUORS ON HAND AS EVIDENCE. Where a registered pharmacist is on trial for keeping a liquor nuisance, the jury may consider the quantity of liquors kept by him, in connection with the legitimate demands of his business, in determining whether such liquors were kept for a lawful purpose. (See *State v. Shank*, 74 Iowa, 651.) *Id.*
5. ——— : ——— : TIME : INSTRUCTION. In such case it was error to instruct the jury to determine whether the defendant kept intoxicating liquors for illegal purposes during the time covered by the

indictment, when defendant, as a registered pharmacist, could lawfully sell such liquors during a portion of that time; but the error was without prejudice, since counsel for the state waived all claim as to matters which transpired during the time when defendant could lawfully sell such liquors, and for the further reason that the court, in another instruction, properly limited the time to be considered by the jury. *Id.*

6. ——— : ABATEMENT OF ACTION : OTHER ACTION PENDING. The petition in this case charged defendant with keeping a liquor nuisance "at numbers 154 and 162 Sixth street," in the city of Dubuque. Defendant in his verified answer admitted all that plaintiff was required to prove to authorize an injunction restraining the nuisance; but he withdrew this answer, and filed an amended answer, denying generally, and setting up as a plea in abatement that another action, brought by the same plaintiff against him, was pending in the same court for the same purpose, wherein the place of the alleged nuisance was described as "number 168 Sixth street," in the city of Dubuque, and alleging that the places set out in the two petitions were identical. *Held* that the places could not, from their descriptions in the petitions, be regarded as identical, and, as the evidence introduced failed to establish such identity, and as defendant under oath, in his original answer, admitted all that plaintiff was required to prove, there should have been a decree granting an injunction as prayed, and for attorney's fee. *Farley v. Hollenfeltz*, 126.
7. ——— : FINE : AMOUNT : DISCRETION OF COURT. Defendant plead guilty to an indictment for keeping a liquor nuisance, and was adjudged to pay a fine of one thousand dollars. He filed an affidavit to the effect that he believed the laws prohibiting the sales of liquors as he sold them to be unconstitutional, and that, as soon as the supreme court of the United States declared such laws to be constitutional, he closed his saloon, and was resolved never again to engage in the business in violation of law. There being nothing in the record as to the defendant's antecedents, and nothing to show how often, if ever before, he had been indicted for similar offenses, *held* that this court could not say that the district court had abused its discretion, or that the fine was excessive. *State v. Meloney*, 414.
8. ——— : EVIDENCE : PAYMENT OF UNITED STATES TAX. Laws of 1886, chapter 118, section 1 (McClain's Ann. Code, sec. 2400) provides that the fact of having paid the United States special tax for the sale of intoxicating liquors, is evidence that the persons so paying were engaged in keeping and selling such liquors. And in this case, where defendants were charged with keeping a liquor nuisance, and it was shown that they sold a liquor called "B. B.," and the evidence was conflicting as to whether it was intoxicating, but defendants admitted the payment of the United States tax to protect them in the sale of that liquor, *held* that the evidence was sufficient to warrant a decree against them, enjoining and abating the nuisance, and adjudging them to pay the costs, including an attorney's fee. *State v. Schultz*, 479.
9. ——— : SALES IN ORIGINAL, IMPORTED PACKAGES : GOOD FAITH OF DEFENDANT. It is a violation of the laws of this state to sell intoxicating liquors without a proper license, though the sales are made only in original, unbroken, imported packages (see cases cited in opinion); and one who violates an injunction by the sale of such liquors cannot escape the penalty on the ground that he in good faith believed that such sales were not a violation of the law. *State v. Bowman*, 56.

JUDGMENTS.

1. **JUDGMENT ON DEFAULT : SETTING ASIDE.** Where a judgment upon default was rendered upon an amended petition, of which defendant had no notice, claiming to recover largely in excess of the original petition, and which was not entered upon the court calendars, and was filed only a short time before the default was entered, and at the very last hour of the term, such judgment was properly set aside upon motion made at the next term, under section 3154, paragraph 3, of the Code. *Walker v. Freelove*, 752.
2. **—— : NOT WARRANTED BY PETITION : REMEDY OF DEFENDANT.** Where plaintiff, upon the default of defendant, was awarded relief to which he did not show himself entitled by the averments of his petition, and which he did not demand, *held* that plaintiff had the right to have the judgment modified upon motion for that purpose, and that he had a right to appeal from an order overruling his motion. *Mickley v. Tomlinson*, 383.
3. **ON NOTE : ASSIGNMENT TO INDORSER : SATISFACTION.** Defendant executed its note to C., who indorsed it to plaintiff. Plaintiff brought action upon the note, and took the default of both defendant and C., but took judgment against defendant only. C. furnished A. with sufficient money to procure an assignment of the judgment to A., but A. held it for C. only, and, in legal effect, C. paid the money and took the assignment to himself. *Held* that the judgment was not thereby satisfied, as C. was not a judgment debtor. (See opinion for cases distinguished.) *Des Moines Sav. Bank v. Colfax Hotel Co.*, 497.
4. **PERSONAL JUDGMENT : WHAT IS NOT.** See Assignment for Benefit of Creditors, 2.
5. **JUDGMENT LIEN : HOW AFFECTED BY VOID SALE.** See Attachments, 1.
6. **JUDGMENT LIEN.** See Banks and Banking, 2.
7. **ARREST OF JUDGMENT.** See Criminal Law, 3.
8. **LIEN UPON HOMESTEAD.** See Homesteads, 2.
9. **USURY IN JUDGMENT : CONCLUSIVENESS.** See Usury, 1.

JUDICIAL SALES.

AFTER DEATH OF JUDGMENT DEBTOR : VOID. See Executions, 2.

JURISDICTION.

1. **OF SUPREME COURT.** See Appeals, 1, 2.
2. **OF COUNTY COURT.** See Highways, 1.

JURORS AND JURY.

1. **TRIAL BY JURY OF ELEVEN.** See Criminal Law, 8.
2. **SELECTION OF GRAND JURY.** See Criminal Law, 5.

JUSTICES OF THE PEACE.

1. **ELECTION : NUMBER : VALIDITY.** In order to make valid the election of one or two additional justices of the peace in a township, under section 592 of the Code, the trustees must not only so direct, and post up notices accordingly, but such direction must be made

a matter of record in the proceedings of the trustees (Code, section 395); and where such notices were posted, but no recorded direction was made, and four justices were voted for, only the two who received the highest number of votes were lawfully elected. *State v. Gaston*, 457.

2. **TRIAL FEES: "TRIAL" DEFINED.** "A trial is a judicial examination of the issues in an action, whether they be issues of law or of fact." (Code, sec. 2739.) In criminal cases before a justice of the peace, where no issue of law is raised by demurrer, and the defendant pleads "guilty," thus avoiding any issue of fact, and judgment is rendered upon such plea, there can be no "trial," within the meaning of the statute, and, therefore, in such cases, the justice is not entitled to the trial fee provided by section 3804 of the Code. (*Shaw v. Kendig*, 57 Iowa, 890, *distinguished*.) *Mathews v. Clayton County*, 510.

LACHES.

See EQUITY, 1.

LANDS.

EXCHANGE OF. See False Representations, 2, 3.

See PUBLIC LANDS; VENDORS AND PURCHASERS; SPECIFIC PERFORMANCE.

LARCENY.

See CRIMINAL LAW, 47-49.

LIENS.

FOR LIENS OF VARIOUS KINDS, see appropriate titles; also, Priority of Claims.

LIFE INSURANCE.

See INSURANCE, 8-5.

LIMITATION OF ACTIONS.

1. **UNDER STATUTE.** See Statute of Limitations.
2. **UPON CLAIMS AGAINST DECEDENTS.** See Estates of Decedents, 9, 10.
3. **UNDER LIFE-INSURANCE POLICY.** See Insurance, 4.

MANDAMUS.

RIGHT TO EXPIRED TERM OF OFFICE. A peremptory writ of *mandamus* will not issue to compel a canvassing board to reassemble and canvass the return of votes for an office, and to declare the candidate who received a majority of the votes cast therefor to be elected thereto, after the expiration of the term for which he was elected; because the writ, if issued, could have no practical effect. (Compare *State v. Porter*, 58 Iowa, 19, and *Railway Co. v. Dey*, 76 Iowa, 278.) *Potts v. Tuttle*, 253.

MASTER AND SERVANT.

DEFECTIVE MACHINERY: PERSONAL INJURY. Plaintiff, in the performance of his duty as defendant's employe, was required to place a belt upon a pulley, and in order to do so he used a ladder to climb to the pulley, and because the belt worked hard, as he tried to

move it, the ladder slipped and caught into another pulley, and threw plaintiff upon a belt running a tenon-machine, and he was finally thrown upon the knives of the tenon-machine and injured. *Held—*

- (1) That, since it was not the structure of the ladder that caused plaintiff to fall, but rather the strain upon it required by the work he was doing, he could not recover on account of alleged defects in the ladder.
- (2) That he could not recover on the ground that there should have been a "shifter" provided for placing the belt upon the pulley, because the pulley in question was a fixed one, and shifters are not used with fixed pulleys.
- (3) That defendant could not be charged with negligence in not having the knives of the tenon-machine covered, in the absence of a showing that it was customary, or even practicable, to cover such knives. *Young v. Burlington Wire Mattress Co.*, 416.

MERGER.

See MORTGAGES, 3.

MISTAKE.

1. **EQUITABLE RELIEF IN ACTION BASED ON FRAUD.** See Contracts, 14.
2. **CORRECTION: ESTOPPEL.** See Highways, 3.

MORTGAGES.

1. **NOTES DUE IN SUCCESSION: ORDER OF PAYMENT.** A mortgage secured three notes due in successive years, with no provision for payment before maturity. The first two were indorsed to plaintiffs, and the third to defendant. The mortgage provided: "But should said party of the first part fail to pay said notes or the interest when due * * * as above provided, then the whole sum remaining unpaid shall become due, and this mortgage may be foreclosed." Upon failure to pay the first two notes when due, plaintiffs began an action of foreclosure, and defendant intervened, setting up that his note became due upon failure to pay the other two, and asking to share *pro rata* in the proceeds of the property. But *held* that the third note did not, by the provision of the mortgage, become due in such sense as to expunge from the contract the agreement implied by law, that the notes should have priority in the order of their maturity; which is the established doctrine in this state. (See opinion for citations.) *Leavitt v. Reynolds*, 348.
2. **SALE OF PART OF THE PROPERTY: FORECLOSURE: PRIORITIES.** Where one tract of land was mortgaged to plaintiff to secure all of five notes, and a second tract was mortgaged to him to secure the first note only, and the mortgagor afterwards sold the second tract to defendant, in an action to foreclose both mortgages, *held* that the first tract should be sold first, and the proceeds applied first to satisfy the first note, and that the second tract should be sold, if at all, only to satisfy such portion of the first note as was not satisfied by the sale of the first tract;—the rule being that, when a mortgagor sells and conveys a part of the mortgaged property, and retains the ownership of a part, the part he continues to own shall be first sold, and the part conveyed by him shall, in the hands of his grantee, or those claiming under him, be subject to sale only to satisfy any balance remaining after sale of the property retained by the mortgagor. (See *Massie v. Wilson*, 16 Iowa, 390, and *Bates v. Ruddick*, 2 Iowa, 423.) *Mickley v. Tomlinson*, 383.

8. **MERGER : APPLICATION OF PAYMENTS.** Plaintiffs held the note of G., which was secured by a chattel mortgage, and also by a mortgage on four hundred acres of land. G. sold nine hundred and twenty acres of land, including the four hundred acres, to his sons, who assumed a large amount of mortgage indebtedness thereon, including the debt to plaintiffs. Afterwards, the sons, by a deed absolute on its face, but which, with collateral agreements, was a mortgage in effect, conveyed seven hundred and sixty acres of the land to plaintiffs, who agreed to pay all the mortgages on the land conveyed to them, and a certain judgment, and all taxes, and to hold G. "harmless from the payment of the same." The sons had the right to sell any of the land on terms satisfactory to plaintiffs, and were in such case to account for the proceeds. They also had the right to occupy the land for three years, keeping up improvements, and paying interest and taxes. They also had the right to redeem upon certain stated terms. Plaintiffs afterwards sold some of the chattels included in their mortgage first above named, and applied the most of the proceeds in paying interest on mortgages assumed by them in the transactions with the sons. They also sold a portion of the land, taking therefor notes not yet paid.
Held—

- (1) That judgment creditors of G. could not complain if he consented to the use made by plaintiffs of the proceeds of the chattels sold, and that they could not demand that the proceeds of the land sold should be applied upon the payment of the note which plaintiffs held against him.
- (2) That the taking of the title to the land from the sons did not operate to merge their mortgage and the debt secured thereby in the title, and so work a satisfaction also of the chattel mortgage, so as to subject the remaining chattels to liability for other debts owing by G. *Sanborn v. Magee*, 501.

See CHATTEL MORTGAGES ; VENDORS AND PURCHASERS, 6.

MUNICIPAL CORPORATIONS.

See CITIES AND TOWNS ; COUNTIES ; SCHOOL DISTRICTS.

MURDER.

See CRIMINAL LAW, 50-56.

NEGLIGENCE,

1. **ALLOWING VICIOUS BULL TO BE AT LARGE.** See Animals, 1, 2.
2. **NEGLIGENT DRIVING.** See Cities and Towns, 7.
3. **IN CARE OF STREETS.** See Cities and Towns, 8-12.
4. **DEFECTIVE MACHINERY.** See Master and Servant, 1.
5. **IN CARRYING GOODS.** See Railroads, 3-7.
6. **IN OPERATING RAILROADS.** See Railroads, 8-21.

See PLEADING, 6.

NEGOTIABLE INSTRUMENTS.

1. **DRAFT : PRESUMPTION AS TO OWNERSHIP.** Defendant was a banker, and, as such, held a note made by H. as principal and B. as surety, payable to C. H. was unable to pay it when due, and the firm of B. & Co. drew a draft "per B.," payable to defendant's

order, and gave it to H. with which to pay the note. By this time defendant had severed his connection with the bank, but he indorsed the draft and assumed control of the proceeds, though he knew that they were intended to pay the note. Afterwards, on request of H., he paid the money to him. *Held* that there was nothing to indicate to defendant that H. had not paid for the draft, and that he was not entitled to the money, but the contrary; and that, as defendant was charged with no duty as to the note, he was not liable to B. & Co. for the money. *Beal v. Stevens*, 28.

2. **INNOCENT PURCHASER.** Where the holder of a note and mortgage has agreed with a purchaser of the mortgaged property for an extension of the time of payment, but no memorandum of such agreement is entered on the original papers, and these are transferred for value after the original date of their falling due, as shown on their face, and without any notice of the extension, the assignee of the paper takes it "after due," in such sense that he acquires no rights which his assignor could not have claimed and enforced. *Duncan v. Finn*, 658.
3. **CONVERSION OF.** See DAMAGES, 1.
4. **LOST DRAFT.** See EVIDENCE, 13.

NEW TRIALS.

See PRACTICE AND PROCEDURE IN SUPREME COURT, 23 ; TAX SALE AND DEED, 4.

NUISANCES.

See INTOXICATING LIQUORS.

PARENT AND CHILD.

DUTY TO SUPPORT CHILD : EMANCIPATION. See Domestic Relations, 1, 2.

PARTIES TO ACTIONS.

1. **INJUNCTION TO RESTRAIN UNLAWFUL DISPOSITION OF PUBLIC PROPERTY.** See Cities and Towns, 2.
2. **ACTION BY TAXPAYER FOR BREACH OF CONTRACT TO SUPPLY WATER TO CITY.** See Cities and Towns, 5, 6.
3. **ACTION BY BENEFICIARY OF CONTRACT.** See Contracts, 2.
4. **JOINDER OF PLAINTIFFS.** See Creditors' Bills, 1.
5. **IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION.** See Executions, 1.

PARTITION.

1. **TENANTS IN COMMON : ALLOWANCE FOR IMPROVEMENTS.** Plaintiff owned an undivided one-third of a tract of land in fee, and a life-estate in the whole, and defendants owned the other two-thirds in fee, subject to the life-estate. Plaintiff procured what purported to be a guardian's deed of defendant's interests, but it was of no effect; yet he believed it to be valid and relied upon it, and believing that he was the sole owner of the land, which was in a wild state, he took possession of it, made improvements equal to the value of the land, and continued in the undisturbed and unchallenged possession of it for twenty years, when he learned of the defect in his title, and brought this action for partition against the defendants. Actual partition could not be made, and a sale was necessary. *Held* that in determining plaintiff's share of the proceeds the court properly allowed him the value of the improvements. (See opinion for citations.) *Killmer v. Wuchner*, 722.

2. **THE SAME : CHOICE OF REMEDIES : EQUITY.** A court of equity having in such case acquired jurisdiction of the cause, it was competent to afford all the relief which equity demanded, and it was not necessary for plaintiff to resort to a court of law to recover the value of his improvements under the occupying-claimant act. (See *Green Bay Lumber Co. v. Ireland*, 77 Iowa, 636.) *Id.*

PARTNERSHIP.

1. **POWER OF PARTNER TO BIND FIRM.** See Chattel Mortgages, 4, 5; Promissory Notes, 2.
2. **EVIDENCE OF.** See Sales, 8.

PAYMENT.

See CONTRACTS, 10 ; JUDGMENTS, 8 ; MORTGAGES, 8.

PENSIONS.

EXEMPTION OF PROPERTY PROCURED WITH. One who pays pension money for the services of a stallion upon mares owned by him, and which were also bought by him with pension money, may hold the colts resulting from such service exempt from liability for his debts, to the extent, at least, of the money paid for such services. To that extent he has invested pension money in the colts, within the meaning of chapter 28, Laws of 1884. [ROTHROCK, J., *dissenting.*] *Diamond v. Palmer*, 578.

PERSONAL INJURIES.

1. **BY BULL RUNNING AT LARGE.** See Animals, 1-5.
2. **BY DEFECTIVE MACHINERY.** See Master and Servant, 1.
3. **IN OPERATION OF RAILWAYS.** See Railroads, 8-17
4. **AMOUNT OF DAMAGES FOR.** See Verdict, 2.

PHARMACISTS.

SALES OF LIQUORS BY. See Intoxicating Liquors, 3-5.

PHYSICIANS.

RIGHT TO DISPENSE LIQUORS TO PATIENTS. See Intoxicating Liquors, 1.

PLEADING.

1. **ANSWER AFTER DEMURRER : EFFECT.** Where defendant demurs to a petition, and the demurrer is overruled, and defendant answers, he thereby admits the sufficiency of the petition, and he cannot again raise that question upon appeal. *Allen v. Platt*, 113.
2. **DIFFERENT COUNTS FOR SAME CAUSE.** In the first count of plaintiff's petition he declared upon a contract for hay sold, and sought to recover the contract price. *Held* that this did not preclude him from setting up in another count an arbitration and award, in which the amount which defendant should pay for the same hay was determined ; since but one recovery was sought upon the whole case, and plaintiff had a right to state his cause of action in different counts. (See *Pearson v. Railway Co.*, 45 Iowa, 497, and *Van Brunt v. Mather*, 48 Iowa, 503.) *Sadler v. Olmstead*, 121.
3. **ADMISSION OF AWARD IS ADMISSION OF AGREEMENT TO ARBITRATE : EVIDENCE.** Where plaintiff in one count sought to recover on a contract, and in another count sought to recover the amount of an award for the same thing, and the answer was a general denial,

except as to facts admitted, and the award was admitted, *held* that this was, in effect, also an admission of the agreement to submit the matter to arbitration, and that it was error for the court to submit any other view of the case to the jury; but that, since the court proceeded upon the theory that there was an issue as to the submission to arbitration, it was inconsistent with that theory to exclude any evidence which tended to prove that the submission was fairly made. *Id.*

4. **MOTION TO STRIKE SURPLUSAGE: APPEAL.** Error in overruling a motion to strike out of a petition irrelevant and redundant matter is not prejudicial, and an appeal will not lie from such a ruling, because the defendant still has the right to object to such matter on the trial. (See *Specht v. Spangenberg*, 70 Iowa, 488.) *Ida County v. Woods*, 148.
5. **MOTION FOR MORE SPECIFIC STATEMENT: PLEADING OVER.** Error in overruling a motion for a more specific statement is waived by pleading over. *Id.*
6. **NEGLIGENCE: GENERAL AVERMENTS: SPECIFIC ACTS.** Although negligence of a particular kind is not specially alleged, it may still be a ground of recovery, if it is fairly covered by the averments of the petition. (See opinion for illustration.) *Neville v. Chicago & N. W. Ry. Co.*, 232.
7. **CLERICAL ERROR: CURED BY OTHER AVERMENTS.** Where the petition alleged that there was due from defendants to plaintiff a certain sum, with interest from October 1, 1888, but the other averments, and the evidence, showed that the property, the price of which was sought to be recovered, was sold and delivered about October 1, 1883, and the prayer of the petition asked for interest from that date, the date first named was properly discarded as a clerical error, and a verdict and judgment rendered in accord with the prayer of the petition. *Fleming v. Stearns*, 256.
8. **CONTRACT WITH FIRM: PARTIES.** Plaintiff, a copartnership, sued on a contract alleged to have been made with it by the defendant. In an amended petition plaintiff alleged that the contract was made by one B. for the benefit of himself, M. and another person named B., and the evidence showed that these three persons were the partners constituting the firm of M. & Co., plaintiff. *Held* that the original and amended petitions showed that the contract was made for the benefit of the plaintiff firm, and that it could maintain an action thereon in the firm name. (See Code, sec. 2543, and cases cited in opinion.) *Marsh v. Chicago, R. I. & P. Ry. Co.*, 332.
9. **TWO COUNTS: ELECTION.** Although the two counts of the petition were, in legal effect, much the same, and no good reason is apparent for both, yet, as no prejudice could have resulted to defendant from the overruling of his motion to compel plaintiff to elect on which he would stand, and to strike out the other, *held* that such ruling was no ground for reversing a judgment for plaintiff. *Taylor County v. Standley*, 666.
10. **WAIVER OF ERRORS.** After defendant had been ruled to answer in thirty days, he filed a motion for a more specific statement of the cause of action, and plaintiff moved to strike this motion from the files, but at the next term he confessed defendant's motion, and filed an amendment to his petition, making a more specific statement. *Held* that by so doing he waived all objections to proceedings whose object was to require him to do that which he at last voluntarily did. *Walker v. Freelove*, 752.

11. PERSONAL INJURIES. See Animals, 5.
12. FILING OF PLEADINGS : WHAT NECESSARY. See Practice and Procedure, 2, 3.

See CONTRACTS, 5 ; CREDITORS' BILLS, 2.

POWER OF ATTORNEY.

See ACKNOWLEDGMENTS, 1.

PRACTICE AND PROCEDURE.

1. SENDING JURY BACK TO AMEND ANSWER TO QUESTION. Where a jury misconceives the true import of a special interrogatory, and fails to answer it according to its true intent, the court may submit a supplementary interrogatory, and send the jury back to answer it. (See opinion for citations.) *Bank of Monroe v. Gifford*, 800.
2. FILING PLEADINGS : ENTRY IN APPEARANCE DOCKET. A pleading is not filed so as to authorize its consideration as a part of the record, unless a memorandum of its filing is entered in the appearance docket. (See *Nickson v. Blair*, 59 Iowa, 531.) *Winkleman v. Winkleman*, 319.
3. ——— : ——— : TRANSFER FROM PROBATE TO EQUITY DOCKET : OBJECTION TOO LATE ON APPEAL. Where a cause was begun in probate in the circuit court, and the pleadings were properly filed, and a memorandum thereof was entered in the probate appearance docket, and the cause was then transferred to the equity docket, and came into the district court by operation of law upon the abolition of the circuit court, *held* that it was not necessary to refile the pleadings, and to enter a memorandum thereof in the appearance docket of the district court ; moreover, that the question of the sufficiency of such filing could not be raised for the first time in this court. *Id.*
4. CONTINUANCE : AMENDMENT OF PETITION. The court in this case properly allowed plaintiffs to file an amendment to their petition, stating more fully the form and substance of the contract sued on, but leaving their claim unchanged. (Code, secs. 2686, 2689.) And since by the original petition defendant was sufficiently advised of plaintiffs' claim to make full preparation for its defense, the filing of the amendment was no ground for a continuance. *Marsh v. Chicago, R. I. & P. Ry. Co.*, 332.
5. ARGUMENT TO JURY : REFERRING TO MATTERS NOT OF RECORD : OBJECTION TOO LATE. In this case there were many witnesses, and some of them were not present, and the transcript of their testimony at a former trial was introduced. Plaintiff's counsel, in addressing the jury, commented upon the testimony of two witnesses at the former trial, which was not introduced on this trial ; but this he did by mistake as to the fact, and defendant's counsel, though present and knowing what was being done, made no objection. *Held* that the error could not, on appeal, be urged as a ground for reversal. *Pence v. Chicago, R. I. & P. Ry. Co.*, 389.
6. ORAL MOTION TO DIRECT VERDICT. A motion by defendant for a verdict upon plaintiff's evidence is a demurrer to the evidence, and need not be in writing, notwithstanding sections 2645, 2649 and 2911 of the Code, requiring motions in general to be in writing. (See *Foley v. Railway Co.*, 64 Iowa, 644.) *Young v. Burlington Wire Mattress Co.*, 416.

7. **TRIAL : IRREGULARITIES : NO PREJUDICE SHOWN.** The facts that during the trial of this case the judge called an attorney to preside while he absented himself for a time, and that the attorney so presiding interrupted defendant's counsel while addressing the jury, and that there was confusion in the court room during this time, will not justify a reversal, where it does not appear that such irregularities worked any prejudice to defendant. *State v. Griffin*, 568.

8. **FOR PRACTICE IN CRIMINAL CASE,** see Criminal Law, *passim*.

See PRACTICE AND PROCEDURE IN SUPREME COURT.

PRACTICE AND PROCEDURE IN SUPREME COURT.

1. **NOTICE : DELAYING TIME FOR HEARING : PRACTICE.** An appeal will not be dismissed because the notice of appeal stated that the cause would be heard at the second term of this court after service of the notice, when the first term after service began more than thirty days after such service. In such case, the appeal was for hearing by operation of law at the first term (Code, secs. 3180-3182), and the statement in the notice that it would be heard at the second term was mere surplusage. If appellant did not have his case ready at the first term, the appellee had the right to file the transcript at that term and have the judgment affirmed or the appeal dismissed, under the statute and the rules of court. *Mickley v. Tomlinson*, 883.
2. **LESS THAN \$100 : CERTIFICATE.** Where a cause involving less than one hundred dollars is appealed to this court upon the certificate of the trial judge, the facts upon which the certified questions of law arise must be stated in the certificate, as this court cannot look to the testimony to find such facts. (See opinion for citations.) *Des Moines Ins. Co. v. Briley*, 485.
3. **—— : WHAT CERTIFICATE SHOULD CONTAIN.** In such cases the certificate should contain only a bare statement of the facts and the legal point involved. It is not necessary to set out the testimony or the record further than is required to show that the question certified is involved in the case. (See opinion for citations.) *Id.*
4. **RECORD : EVIDENCE.** On appeal to this court, only so much of the evidence offered and introduced should appear in the abstract as is necessary to determine the points to be reviewed. *Weitz v. Ind. Dist. of Des Moines*, 423.
5. **SUPERFLUOUS ABSTRACT : COSTS.** Although the judgment is reversed, the costs of twenty-three pages of appellant's abstract is taxed to him, because it is by so many more pages more lengthy than necessary to present the questions raised by the appeal. *Diamond v. Palmer*, 578.
6. **RECORD ONLY CONSIDERED.** Certain alleged remarks of a judge, of which defendant complains, cannot be considered by this court, since they are not made a part of the record by bill of exceptions. The affidavit of defendant's counsel, attached to his motion for a new trial, cannot be considered. (See *Rayburn v. Railway Co.*, 74 Iowa, 637.) *State v. Hall*, 674.
7. **ABSTRACT FILED TOO LATE.** An appellee's abstract will not be stricken from the files because not filed within the time prescribed by the rules of this court, where it does not appear that the submission of the cause was delayed thereby. *Wilson v. Daniels*, 132.

8. **BILL OF EXCEPTIONS FILED TOO LATE.** Where sixty days were allowed defendant within which to file a bill of exceptions, but none was filed until long after the expiration of that time, when one was filed by leave of court, and when a certified record of the evidence was also for the first time filed, *held* that a motion to dismiss the appeal should be sustained, at least so far as to strike from the record what purports to be the evidence. (Compare *Deering v. Irving*, 76 Iowa, 519.) *Short v. Chicago, M. & St. P. Ry. Co.*, 73.
9. **BILL OF EXCEPTIONS : WHAT SUFFICIENT : REPORTER'S NOTES.** Where the short-hand reporter's notes in a law action are ordered to be made a part of the record, and they are duly certified by the judge, on the day of the verdict, as containing all the evidence offered or introduced, and all the objections and rulings made and exceptions taken, this constitutes a sufficient bill of exceptions; and it is immaterial that the translation of the notes is not filed within the time allowed for taking an appeal. (See opinion for citations.) *Fleming v. Stearns*, 256.
10. **REVERSAL : NOMINAL DAMAGES.** This court will not reverse a judgment on the ground that mere nominal damages were not allowed the appellant. *Id.*
11. **REVERSAL FOR NOMINAL DAMAGES.** Where there has been a breach of contract, but the evidence shows that no actual damages have resulted to plaintiff therefrom, this court will not reverse a judgment for defendant on the ground that the trial court erred in not instructing that plaintiff was entitled to nominal damages. (See opinion for citations.) *Faulkner v. Closter*, 15.
12. **NO REVERSAL FOR TRIFLING ERROR IN AMOUNT.** This court will not reverse a judgment and remand a cause for new trial on the mere ground that the judgment is for a sum a trifle too large, and the correction cannot be made in this court, because the record leaves in doubt what the exact amount should be. (Compare *Watson v. Moeller*, 63 Iowa, 161, and *Machine Co. v. Haven*, 65 Iowa, 359.) *Rappleye v. Cook*, 564.
13. **REVIEW OF INSTRUCTIONS : EVIDENCE WANTING.** Complaint that the court erred in giving and refusing instructions cannot be considered in the absence of the evidence necessary to determine the questions thus raised. *State v. Grossheim*, 76.
14. **INSTRUCTIONS : EVIDENCE WANTING : PRESUMPTION.** This court will presume that an instruction given by the trial court was justified by the evidence, where the evidence is stricken from the record. *Short v. Chicago, M. & St. P. Ry. Co.*, 73.
15. **ARGUMENT : ESTOPPEL BY RECORD.** Counsel cannot be permitted, in his argument in this court, to deny in his reply a fact which is shown by the testimony set out in his abstract, and which he has admitted by implication in his opening argument. *Collins v. Valleau*, 627.
16. **OBJECTION NOT RAISED BELOW.** Where a judgment sustaining a demurrer to a petition was reversed in this court and the cause remanded, and defendant afterwards filed an answer in the court below, and plaintiff made no objection, but went to trial, and his petition was dismissed, *held* that he could not then be heard to claim in this court that the controversy was fully adjudicated by the ruling on the demurrer, and that further proceedings were error. *Bolton v. McShane*, 26.

17. **DEFENSE NOT RAISED BELOW.** An appellant cannot for the first time in this court insist upon a defense which should have been pleaded affirmatively in the court below. *Pierce v. Early*, 199.
18. **NEW DEFENSES NOT CONSIDERED.** Defenses not pleaded and relied on in the court below cannot be considered when raised by argument in this court. *Beard v. St. Louis, A. & T. H. Ry. Co.*, 527.
19. **QUESTION RAISED BY APPELLEE.** A party who does not appeal cannot be heard in this court to raise objections to the rulings of the trial court. *Hanks v. Brown*, 560.
20. **ERRORS NOT REVIEWABLE.** Where, by agreement, a transcript of the evidence of a witness given upon a former trial of the case was admitted,—the witness being absent,—the rulings made on the former trial, as shown by the transcript, cannot be reviewed on appeal from the second trial. *State v. Shank*, 47.
21. **EXCESSIVE JUDGMENT: REMITTITUR: COSTS.** In this case the judgment in favor of plaintiff, and from which defendant appealed, is found, by a calculation from the *data*, to be excessive; but, plaintiff having offered to remit the excess, the judgment is modified accordingly and affirmed, but at plaintiff's costs. *Pelley v. Walker*, 142.
22. **PRESUMPTION IN FAVOR OF TRIAL COURT.** This court will presume, in favor of a judgment of the district court, that the action in which it was rendered was not prematurely brought, where the record does not forbid such presumption. *Ida County v. Woods*, 148.
23. **NEW TRIAL: WEIGHT OF EVIDENCE.** Where a motion for a new trial is granted on the ground that the verdict is not sustained by the evidence, this court will not interfere, unless it clearly appears that injustice has been done, and the discretion of the court below abused. (See opinion for citations.) *Morgan v. Wagner*, 174.
24. **AFFIRMANCE ON MOTION: JUDGMENT ON APPEAL BOND.** See Criminal Law, 16, 17.
25. **TRIAL DE NOVO.** See Quo Warranto, 1.

PRESCRIPTION.

TITLE BY. See Highways, 4, 5.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETIES.

PRIORITY OF CLAIMS.

See ATTACHMENT, 1; CHATTEL MORTGAGES, 9; ESTATES OF DECEDENTS, 7; MORTGAGES, 1-3; VENDORS AND PURCHASERS, 8, 10.

PROMISSORY NOTES.

1. **MADE ON SUNDAY: RATIFICATION BY PARTIAL PAYMENT.** Promissory notes executed on Sunday are void, but they are ratified, and thus made valid, by partial payment on a secular day. (Compare *Harrison v. Colton*, 81 Iowa, 16.) *Russell v. Murdock*, 101.

2. **THE SAME: RATIFICATION BY PARTNER: ESTOPPEL.** Where the notes in such case are executed by two persons as partners, ratification by one will bind both; and the other, having alleged that she was a partner, cannot afterwards be heard to deny it in order to avoid the effect of the ratification. *Id.*
3. ———: **RATIFICATION BY ONE JOINT MAKER.** Partial payment by one joint maker of such notes is a ratification for other joint makers, and makes the notes valid as to them. *Id.*
4. ———: **RATIFICATION OF MORTGAGE.** The ratification of such notes by partial payment is also a ratification of the mortgage, executed at the same time, to secure the notes. *Id.*
5. **CONVERSION OF: DAMAGES: EVIDENCE.** See Damages, 1.
6. **NOTES SECURED BY MORTGAGE: PRIORITY.** See Mortgages, 1.
7. **INNOCENT PURCHASER.** See Negotiable Instruments, 2.

PUBLIC LANDS.

RAILROAD GRANTS: CONCLUSIVENESS OF LOCATION. By act of congress of May 12, 1864, and certain acts of the general assembly of Iowa pursuant thereto, the odd-numbered sections of land for ten miles on each side of a railroad to be constructed by the McGregor Western Railroad Company, from McGregor, Iowa, to an intersection in O'Brien county with the Sioux City and St. Paul railroad, not yet constructed, were granted to the said McGregor Western Railroad Company; and the act of congress provided that, as soon as maps designating the route of said road should be filed in the office of the secretary of the interior, he should withdraw from market the lands embraced within the provisions of the act, as indicated by said maps. Such maps were filed in August, 1864, showing an intersection of the line of the road with the proposed line of the Sioux City and St. Paul railroad in O'Brien county. But the location of the line of the latter road was afterwards so changed that a change of the line of the McGregor road was necessary in order to make the intersection required by the act of congress first above referred to. The McGregor company accordingly relocated the western portion of its line so as to make the intersection, and in 1869 filed new maps showing the line as relocated, and such relocation was permitted and approved by the secretary of the interior. *Held* that the first location, failing to meet the requirement of the act of congress, was not final and conclusive as to the sections of land included in the grant; that the secretary of the interior was authorized, without another act of congress, to withdraw from sale the lands within ten miles of the newly located line; and that defendant could not acquire a homestead right to an odd-numbered section within ten miles of the line as located in 1869, though it was more than that distance from the location of 1864. *Western Land Co. v. Hamblin*, 539.

QUESTIONS OF LAW OR FACT.

See **ANIMALS**, 2; **APPEALS**, 1; **BRIDGES**, 1; **CITIES AND TOWNS**, 7; **CONTRACTS**, 13.

QUO WARRANTO.

APPEAL: TRIAL. A proceeding by *quo warranto* is not triable anew in this court; and the finding of fact by the trial court will not be set aside where there is some evidence to support it. *State v. Gaston*, 457.

RAILROADS.

1. **IN STREETS: DAMAGES TO LOT-OWNERS: TITLES: ACQUIESCENCE: JOINT TENANCY.** In 1874, Y. and W. were the joint owners of lots abutting upon a city street on which defendant's railroad tracks are now laid, and plaintiff, as the grantee of Y. and W., by an action in equity, seeks to recover damages, under section 464 of the Code, for such use of the street, and to abate the tracks as a nuisance. The track nearest to plaintiff's lots was laid in 1870, when lot-owners had no legal right to object or to demand damages. Y., one of the owners in 1874, at that time consented to the laying down of the other track, of which alone complaint is made, though almost the whole street was at that time, and is yet, occupied with defendant's tracks and used for railroad purposes. No complaint was made of the track in question by any owner of the lots in question until 1883, eight and one-half years after it had been laid down. *Held*—
 - (1) That Y.'s consent to the laying of the track, though merely oral, was binding on himself, and also, under the circumstances, on his co-tenant W., and that neither they nor their grantee could recover damages or object to the track, especially after so long acquiescence. (See *Pratt v. Railway Co.*, 72 Iowa, 249.)
 - (2) That the fact that another person held a tax title on the lots in 1874 was immaterial, as Y. and W. afterwards acquired that title also, and their continuing acquiescence in the use of the street was equivalent to a new parol license.
 - (3) That the fact that the tracks were laid in the usual manner, with the rails above ground, and not planked between, so as to make a level street, and that cars which were filthy and offensive were allowed to stand thereon, was no ground for damages,—such use of the street appearing to be according to common usage in such cases, and fairly within the contemplation of the parties when consent to lay the tracks was given, and the owners of the lots having for so long a time acquiesced in such use. *Merchants' Union Barb-Wire Co. v. Chicago, R. I. & P. Ry. Co.*, 614.
2. **POOLS: POWER OF AGENT TO CONTRACT FOR REBATES.** A contract to pay a rebate on stock shipped over a certain line of road is but a contract for a special rate, and evidence that defendant's stock-agent had made contracts for special rates which the company had recognized and performed, was evidence of his authority to contract for rebates on future shipments, notwithstanding the existence of a pool; for it is the pool which makes it necessary to contract for rebates rather than for special rates, and such contracts necessarily relate to the future. *Marsh v. Chicago, R. I. & P. Ry. Co.*, 832.
3. **DUTY TO CARE FOR GOODS CARRIED.** A carrier must use due diligence to protect goods which he receives for carriage from every source of injury which he may avert, and which, in the exercise of care and ordinary intelligence, may be known or anticipated; and he must have regard to the character of the goods he transports. And so, where defendant in summer time shipped butter in refrigerator cars from northern Iowa to New Orleans, and it was carried in such cars to St. Louis, and was there delivered to an intermediate carrier, who placed it in ordinary cars and transported it a short distance and then turned the cars over to defendant, and the defendant transported it in the same cars, with no protection against the heat of the season, to New Orleans, and it was damaged by the heat, *held*—

- (1) That it was defendant's duty to transport the butter in such cars as would have protected it from injury by heat.
 - (2) That, having accepted the butter for transportation, it could not avoid liability on the ground that it did not have the necessary cars to transport it with safety.
 - (3) That it could not be excused on the ground that the cars in which it received the butter were sealed.
 - (4) That a custom to haul the cars received from the intermediate carrier, without change of cargo, was no defense.
 - (5) That it was no defense that the rate of charges, as shown by the way-bill, was for common cars only. (See opinion for citations in support of the foregoing points.) *Beard v. Illinois Cent. Ry. Co.*, 518.
4. ——— : EVIDENCE. In such case, evidence tending to show that a custom prevailed among carriers by railroad to put butter into cold storage when refrigerator cars were not ready to receive it, was properly admitted to sustain the general allegation of negligence on defendant's part in not taking proper precautions to preserve the butter. *Id.*
 5. ——— : PRESUMPTION AS TO CONDITION OF GOODS. In such case the court properly instructed the jury that they might infer that the butter was in good condition when received by defendant, from the fact that it was shipped in good order, in a refrigerator car, for St. Louis. (See opinion for citations.) *Id.*
 6. CONTRACT TO TRANSPORT GOODS : INTERPRETATION. The acceptance by a carrier in the state of Illinois of goods for transportation, which are marked for carriage beyond the terminus of such carrier's line, establishes *prima facie*, under the laws of that state, a contract for the transportation of the goods to their place of destination, so as to make such carrier liable for damage to the goods through the negligence of a subsequent carrier ; and it makes no difference that the carrier so accepting the goods is not the initial carrier, but itself received the goods from a previous carrier. *Beard v. St. Louis, A. & T. H. Ry. Co.*, 527.
 7. TRANSPORTATION OF BUTTER : CARS TO BE USED. A railroad company which undertakes to transport butter a long distance in hot weather is not relieved from the duty of carrying it in refrigerator cars, on the ground that the rate of charges named is the rate for common cars. The contract being silent as to the kind of cars to be used, the company is obliged to use such cars as are necessary to transport the butter in good order. (Compare *Beard v. Railway Co.*, ante, p. 519.) *Id.*
 8. INJURY TO BRAKEMAN : CONTRIBUTORY NEGLIGENCE. Plaintiff was middle brakeman on defendant's freight train. He saw a car in bad order attached to the rear of the train by means of a chain, and knew that it was so attached because the draw-bar was gone. The absence of the draw-bar permitted the bad-order car to come so near to the car to which it was attached as to crush a person standing between. The bad-order car afterwards became detached from the train, and plaintiff went back to assist in attaching it again. When he passed the rear of the train it was moving slowly forward, and the bad-order car, which was about fifteen feet from the train, was being pushed along slowly toward the train by another employe. Plaintiff took hold of the side of this car, at the end nearest the train, and helped push it along. After moving

along a few steps, he went between the bad-order car and the train to adjust the chain, and very soon he was caught between the car and the train, which meantime had come to a stop, and he was seriously injured. *Held* that plaintiff was himself guilty of negligence contributing to the injury, and that he could not recover of the defendant on account thereof. *Rebelsky v. Chicago & N. W. Ry. Co.*, 55.

9. INJURY TO CAR-COUPLER: NEGLIGENT IGNORANCE OF ENGINEER AND FIREMAN. Since it may have been negligence in this case for the engineer and fireman not to know that plaintiff had gone between the locomotive and an attached car to uncouple the car, the court properly refused an instruction which ignored that fact. *Neville v. Chicago & N. W. Ry. Co.*, 232.
10. NURSE FOR INJURED EMPLOYE: CONTRACT OF HIRING: AGENCY: EVIDENCE. In this action to recover on an alleged contract for services rendered in nursing an injured employe of defendant, the evidence bearing upon the alleged contract of hiring is considered (see opinion) and *held* to warrant the finding of the jury that plaintiff was hired by defendant, through its claim-agent and surgeon, as alleged. *Bigham v. Chicago, M. & St. P. Ry. Co.*, 534.
11. COLLISION AT HIGHWAY CROSSING: NEGLIGENCE: EVIDENCE. Plaintiff, riding in a wagon, was about to cross defendant's two lines of railroad which were only eighty feet apart. He testified that before reaching the first crossing he stopped and looked and listened for trains, but saw and heard none; that just as he cleared that crossing a train rushed by on that track, and that another, which was rapidly approaching on the second track, collided with his team and wagon and severely injured him. The evidence is reviewed (see opinion) and *held* to be conflicting as to obstructions which might have prevented plaintiff from seeing the approaching trains; also, as to the speed of the trains, and as to whether proper signals were given by them as they approached the crossings; wherefore it was properly submitted to the jury, whose verdict thereon cannot be disturbed in this court. *Pence v. Chicago, R. I. & P. Ry. Co.*, 389.
12. ———: TWO TRACKS AND TRAINS. In such case it was proper to consider together the matters involved in the operation of the two trains. *Id.*
13. ———: SPEED OF TRAINS: EVIDENCE. In such case, a witness who resided in the locality of the accident, and was familiar with the running of trains, and saw the trains in question pass, was competent to testify to their speed. *Id.*
14. ———: NEGLIGENCE: INSTRUCTIONS AS TO SEPARATE ALLEGATIONS. In such case it was not the duty of the court to point out each matter alleged as negligence, and to designate all the evidence which could properly be considered in connection with it, for such course would have made the charge so intricate and lengthy that it would have been as likely to confuse as to instruct the jury. *Id.*
15. ———: INSTRUCTIONS AS TO OBJECTS OBSTRUCTING VIEW: ASSUMPTION OF FACTS. In such case the court instructed as follows: "Evidence has been introduced as to the existence of trees, fences and other objects upon the right of way of defendant; also, of the condition of the highway at different points near and over said crossing. You are instructed that said condition of the highway, and the existence of such objects in the right of way, if you find

said objects did exist, and that the condition of said highway has been shown, did not constitute negligence on the part of the defendant, but are competent as proving the degree of care which should be exercised by the defendant, and also by the plaintiff, in approaching said crossing." *Held* not erroneous, though the evidence did not show any obstruction on the right of way;—the vital matter being, not whether they stood on the right of way, but how far they obstructed the view. *Id.*

16. ——— : EVIDENCE, AFFIRMATIVE AND NEGATIVE : WEIGHT. In such case an instruction was properly refused which charged that "affirmative testimony, as that a bell was rung or a whistle sounded, is entitled to more weight than negative testimony, as that a bell or whistle was not heard," because it ignored the comparative credibility and means of knowledge of the witnesses. *Id.*
17. INJURY TO PASSENGER IN JUMPING FROM MOVING TRAIN : CONTRIBUTORY NEGLIGENCE : EVIDENCE. The testimony in this case (see opinion) shows that plaintiff was riding on the rear platform on defendant's caboose as he was nearing his destination; that it was a dark night; that while there the conductor took his ticket, but said nothing to him. Plaintiff testified that some one told him that the train would not stop at the station, but would "slow up," and that he should jump off after the caboose had passed the platform, to which plaintiff responded, "all right;" but plaintiff was unable to say that it was the conductor who thus addressed him, or who it was, and the conductor and the brakeman each testify that he told him no such thing. The train did "slow up," and the conductor testified that it would have stopped, had he not discovered that plaintiff had left it, and, therefore, signaled for it to go ahead. Plaintiff was a railroad man, of nine years' experience, and was accustomed to ride upon trains. He jumped off the train and was injured. *Held* that the evidence showed negligence on the part of plaintiff, but failed to show any on the part of defendant, and that plaintiff could not recover. *Herman v. Chicago, M. & St. P. Ry. Co.*, 161.
18. DUTY TO KEEP CATTLE-GUARDS FREE FROM SNOW AND ICE. A railroad company is required to use ordinary diligence to keep its cattle-guards free from snow and ice, after it has had notice, or could have acquired notice in the exercise of ordinary care, that they are obstructed thereby. (*Grahman v. Railway Co.*, 78 Iowa, 564, *followed.*) *Robinson v. Chicago, R. I. & P. Ry. Co.*, 495.
19. UNLAWFUL SPEED AT STATIONS : KILLING OF ANIMALS BEYOND THE GROUNDS : PROXIMATE CAUSE. Where, by the unlawful speed of a train upon station grounds, animals at large thereon are stampeded, and they run upon the track beyond the grounds, whether by breaking down fences or otherwise, and without checking the speed of the train they are run down and killed, the unlawful speed of the train may fairly be said to be the proximate cause of the injury, and the company is liable therefor. (*Monahan v. Railway Co.*, 45 Iowa, 523, *distinguished.*) *Story v. Chicago, M. & St. P. Ry. Co.*, 402.
20. INJURY TO STOCK AT LARGE : HERD LAW : DUTY OF STOCK-OWNER. In an action for negligently killing horses which were at large upon a railroad track, in a county where the herd law was in force, if the owner of the horses had them enclosed in a field with a fence reasonably sufficient to prevent them from escaping therefrom, he was not chargeable with contributory negligence from the fact that the fence was not actually sufficient to restrain them. See opinion for citations.) *Id.*

21. ——— : SUFFICIENCY OF FENCE : EVIDENCE. Where the question in dispute was whether the fence was reasonably sufficient to restrain the horses which it was conceded escaped through the fence, evidence to the effect that the fence was not in fact sufficient was immaterial. *Id.*

22. GRANTS OF LANDS TO. See Public Lands, 1.

RAPE.

ASSAULT WITH INTENT. See Criminal Law, 57-60.

REAL ESTATE.

See LANDS.

RECEIVERS.

See BANKS AND BANKING, 2

REMEDIES.

CHOICE OF. See Appeals; 2 ; Cities and Towns, 4. 13 ; Corporations, 6 ; Counties, 2 ; Partition, 2 ; Tax Sale and Deed, 4.

REPLEVIN.

DELIVERY BOND : LIABILITY OF SURETIES FOR NON-DELIVERY. In an action to replevy pumping machinery which was in use in a mine, the machinery was left with the defendants upon their executing a delivery bond, on which defendant herein was surety. There was judgment for the return of the property. *Held* that it was not the duty of defendants in the replevin action to remove the machinery from the mine and deliver it above ground to plaintiff, and that for a failure so to do, after tendering it to plaintiff where it was, the sureties on the delivery bond were not liable. *Nimon v. Reed*, 524.

RES ADJUDICATA.

See FORMER ADJUDICATION.

RIPARIAN RIGHTS.

GOVERNMENT SURVEYS : MEANDER LINES. In the government survey of lands bounded on one side by water, a meander line is not a boundary line, but is made for the purpose of ascertaining the quantity of land subject to sale in the track. And where the government plat and field-notes show no reservation of land between the meander line and the water, the title of the patentee extends to the water. (See opinion for citations.) *Ladd v. Osborne*, 98.

SALES.

1. FAILURE TO DELIVER : MEASURE OF DAMAGES. For breach of contract to deliver a carload of potatoes, the measure of damages is the difference between the contract and market prices at the time and place of delivery; and evidence as to the market price need not be restricted to carload lots. *Faulkner v. Closter*, 15.
2. DELIVERY. Where a farmer sold his farm and his personal property, selling a team to his wife, who rented the farm of the purchaser, and with the aid of her son cultivated it, while the husband engaged in other business and ceased to have any control of the farm, *held*, as against the husband's creditors, that there was a delivery of the team. *Pearson v. Quist*, 54.

3. **EXEMPT PROPERTY : RIGHTS OF CREDITORS.** Creditors have no right to question the validity of a sale by their debtor of exempt property. *Id.*
4. **PAYMENT WITH OTHERS' MONEY : RIGHTS OF CREDITORS.** Creditors cannot attack a sale of property made by their debtor on the ground that the money used in paying for it belonged to third parties. *Id.*
5. **MACHINE : WARRANTY : FAILURE TO COMPLY WITH CONDITIONS.** Defendant purchased a machine of plaintiffs upon a warranty, but the contract provided that if it failed to fill the warranty within ten days of first use, written notice should be given to plaintiffs, and that they should have reasonable time to remedy the defects, and that continued use of the machine after the time named should be conclusive evidence that the warranty was fulfilled. Defendants gave no notice of defects within the prescribed time, but continued the use of the machine. *Held* that they could recover no damages upon an alleged breach of the warranty. (See opinion for citations.) *Russell v. Murdock*, 101.
6. ——— : **CONDITIONED UPON VOID SETTLEMENT : RATIFICATION.** Plaintiffs sold defendants a machine, for which the latter agreed to give their notes secured by a chattel mortgage, and it was provided that the title should not pass until settlement should be concluded and accepted. The notes and mortgage were made on Sunday, but they were afterwards ratified on a secular day. *Held* that by their ratification they became valid, and were then the settlement contemplated, and thereupon the title passed to the defendants. *Id.*
7. **FRAUD : RESCISSION : INSTRUCTION.** Where the supposed solvency of the purchaser of goods on credit is a material inducement to the sale thereof, and the purchaser makes false and fraudulent representations in regard to it, upon which the vendor, not knowing the truth, relies, in effecting the sale, it may be rescinded by the vendor as fraudulent, and the goods recovered back. An instruction in this case, to the effect that the vendor must also prove that the purchaser did not intend to pay for the goods when he bought them, is *held* to be erroneous. (See opinion for citations.) *Reid v. Cowduroy*, 169.
8. **PARTNERSHIP : EVIDENCE : ADMISSIONS.** In an action against the defendants jointly, though not as partners, when one of them claimed to have had nothing to do with the purchase declared on, evidence was properly admitted to the effect that he had stated in plaintiff's presence that he and the other defendant were partners in the business for which the purchase was made; also evidence that he had made similar admissions when the plaintiff was not present. *Fleming v. Stearns*, 256.
9. **WARRANTY : WHEN IMPLIED BY LAW.** Where the plaintiff ordered machinery without inspecting it, and with no opportunity to do so, but defendants knew the use for which it was intended, the law will imply a warranty that the machinery was fit for the designed use, and that it was in merchantable condition, unless such warranty was excluded by the terms of the order; and the mere fact that the contract in such a case provided for certain warranties did not operate to exclude the warranties implied by law, unless such implied warranties were incompatible with the terms of the contract. (See opinion for citations.) *Blackmore v. Fairbanks*, 282.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1.

SCHOOLS.

1. **SCHOOL DISTRICTS : CONTRACT FOR SCHOOL HOUSE : WHAT NECESSARY.** Under section 1723 of the Code, a school district cannot enter into a valid contract for the erection of a school house, except with the lowest responsible bidder upon his giving bonds for the faithful performance of the contract; and the mere acceptance of a bid by mistake, which is not the lowest responsible one, does not constitute a contract with the bidder. *Weitz v. Ind. Dist. of Des Moines*, 428.
2. ——— : ——— : **NOT CONSUMMATED.** Where plaintiff relied upon a resolution of defendant's directors accepting his bid for the erection of a school house, it was error to refuse defendant leave to plead and prove that it was the understanding of both parties that a written contract should be executed by the parties, and that the plaintiff should give bonds for the performance of such contract; for, if such was the understanding, there was no consummated contract. *Id.*
3. ——— : **POPULATION : NUMBER OF DIRECTORS.** Where an independent school district has had a population of five hundred, and so has been entitled to and has had six directors, two elected each year, but the population has fallen below that number, only one director should be elected each year. (*State v. Simpkins*, 77 Iowa, 676, *followed.*) *State v. Wilcox*, 466.

SEDUCTION.

See CRIMINAL LAW, 61-66.

SET-OFF.

See CORPORATIONS, 3.

SPECIFIC PERFORMANCE.

PAROL GIFT OF LAND : STATUTE OF FRAUDS : EVIDENCE. Where a party seeks to compel a conveyance of land which he claims to own by virtue of a parol gift, and to take the case out of the statute of frauds upon the ground of part performance, he must establish the gift by clear, unequivocal and definite testimony, and the acts claimed to be done thereunder, and relied on as part performance, should be equally clear and definite, and referable exclusively to the alleged gift. (See *Williamson v. Williamson*, 4 Iowa, 281.) *Truman v. Truman*, 506.

STATUTES.

CRIMINAL STATUTES STRICTLY CONSTRUED. See Contracts, 12.

See STATUTES CITED, CONSTRUED, ETC.

STATUTES CITED, CONSTRUED, ETC.

[The words in Roman type indicate the subject under consideration, and the figures following refer to the page in this volume where the statute is cited.]

CODE OF 1851.

Secs. 519, 520, 523. Highways: Establishment: Notice: Proof: Jurisdiction. 364, 365.
Sec. 1606. Contempt: Appeal: *Certiorari*. 317 *et seq.*

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Sec. 1796. Assignability of contracts. 226.
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Sec. 205. District attorney: Appearance for county. 669.
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Sec. 395. Township trustees: Records to be kept. 459.
Sec. 464. Railways on streets: Damages. 616.
Sec. 470. Cities and towns: Power to dispose of public property. 590.
Sec. 527. Dedication of streets: Acceptance. 207.

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 Sec. 9.2. Tax title: Defect: Cured by time as against mortgage. 554.
 Sec. 912. Counties: Bond to secure deposit in bank: Collateral security. 708 *et seq.*
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 Secs. 1082-1084. Corporations: Rights of creditors against stockholders. 658.
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 Sec. 1523. Intoxicating liquors: Prohibition. 92.
 Sec. 1572. Insolvent banks: Depositors preferred. 714.
 Sec. 1723. Contracts for school houses. 426.
 *Sec. 1808. No. of school directors: Decrease of population. 467.
 Sec. 1882. Life insurance: Exemption. 601, 602.
 Sec. 1908, 1909. Rights of aliens. 296 *et seq.*
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STATUTE OF FRAUDS.

1. **AGREEMENT TO MORTGAGE LAND FOR PURCHASE MONEY: VENDOR'S LIEN.** Where land had been purchased and partly paid for, and had passed into the possession of the purchaser, under an agreement that he would, as soon as possible, execute a mortgage thereon to the vendor to secure the residue of the purchase price, the agreement to execute the mortgage is excepted from the statute of frauds by section 8665 of the Code. *Devin v. Eagleson*, 269.
2. **PAROL GIFT OF LAND.** See Specific Performance, 1.

STATUTE OF LIMITATIONS.

1. **CARRIERS: UNREASONABLE CHARGES: ACTIONS BASED ON FRAUD.** The provision of section 2530 of the Code, that in actions for relief on the ground of fraud, the cause of action shall not be deemed to have accrued for the purposes of the statute of limitations, until the fraud shall have been discovered, refers to the fraud named in the preceding section—that is, such as was “heretofore solely cognizable in a court of chancery.” Accordingly *held* that actions at law for the recovery of unreasonable charges exacted by a carrier for the transportation of property, not being actions “heretofore solely cognizable in a court of chancery,” accrued when the charges complained of were exacted and paid, and not when the fact was discovered that they were unreasonable and in excess of the charges made to other shippers from the same place. (See opinion for citations.) *Carrier v. Chicago, R. I. & P. Ry. Co.*, 80.
2. **EXCEPTION: FRAUDULENT CONCEALMENT OF RIGHT OF ACTION: APPLICATION OF RULE.** The rule announced in *District Twp. of Boomer v. French*, 40 Iowa, 601, that where the party against whom a cause of action exists in favor of another, by fraud or actual concealment prevents such other from obtaining knowledge

thereof, the statute of limitations will only commence to run from the time the action is discovered, or might, by the use of diligence, have been discovered, is reviewed and adhered to; and in these cases, which are actions to recover freight charges exacted by defendant and paid by plaintiffs in excess of the charges habitually exacted by defendant of other shippers in like cases, it appearing that defendant fraudulently concealed from plaintiffs the fact of the discrimination, *held* that the actions did not accrue, nor the statute of limitations begin to run against them, until that fact was discovered. *Id.*

8. **AGREEMENT TO PAY MONEY: SCHOOL DISTRICTS.** The defendant district was formed out of territory formerly belonging to the plaintiff district, and, in the adjustment of the indebtedness of the original district, for which the plaintiff was primarily liable, defendant agreed to pay a certain per cent. of it. More than fifteen years after that agreement was made, defendant having failed to pay, plaintiff brought this action to recover on the agreement. There was nothing in the contract or the petition to show any intention on the part of the contracting parties that payment should be delayed, nor any necessity therefor. *Held* that a right of action at once accrued upon the agreement, and that this action was barred by the statute of limitations. *Dist. Twp. of Carroll v. Dist. Twp. of Arcadia*, 96.
4. **CONTRACT UNDER ORDINANCE.** Where a city seeks to recover of a railroad company for the breach of a contract arising upon the acceptance of a grant under a city ordinance, the statute of limitations may be interposed as a bar, the same as in cases upon ordinary contracts between natural persons. (See opinion for citations.) *City of Muscatine v. Chicago, R. I. & P. Ry. Co.*, 645.
5. **CONTRACT TO GRADE STREETS WITHIN REASONABLE TIME.** In 1853 plaintiff became bound, under an ordinance making a grant to it, to grade a certain street in a reasonable time. *Held* that an action by the city for a breach of the contract was barred in ten years after the right to it accrued, and that such action, begun in 1886, could not be maintained. *Id.*
6. **RECOVERY OF MONEY ADVANCED.** An action to recover money advanced upon a verbal contract to pay it out for plaintiff's benefit, which defendant fails to do, is barred in five years after it accrues, in the absence of fraudulent concealment on the part of defendant. *Duncan v. Finn*, 658.
7. **AS TO CLAIMS AGAINST ESTATES.** See Estates of Decedents, 9, 10.

See CORPORATIONS, 4, 5.

STREETS.

1. **CARE OF.** See Cities and Towns, 7-13.
2. **RAILROADS ON.** See Railroads, 1.

SUPREME COURT.

1. **JURISDICTION.** See Appeals, 1, 2.
2. **APPEALS TO.** See Appeals, 1-5.

SURETIES.

1. **COLLATERAL SECURITIES: "CONTROL" OF IMPLIES DELIVERY AND ACCEPTANCE.** In an action against the surety upon a promissory note, the defense was that defendant was discharged by reason of the surrender by the plaintiff to the principal debtor of certain bonds which it held as collateral security; and the court instructed

that if plaintiff "controlled such bonds at the time the note was executed, as security for the debt evidenced by the note, and afterwards surrendered them without defendant's consent, then defendant was discharged. *Held* that the word "controlled," as used, implied a delivery of the bonds to plaintiff and an acceptance of them by it. *Bank of Monroe v. Gifford*, 800.

2. **DISCHARGE BY SURRENDER OF COLLATERALS: PAYMENT OF DEBT BY NOTE.** The giving and accepting of a promissory note for a prior debt will not be regarded as payment thereof, unless there be an agreement of the parties to that effect (see opinion for citations); and where the note is signed by one as a surety, and the creditor at the time holds collateral security for the debt, the agreement to make the note an absolute payment of the debt, so as to justify the creditor in surrendering the collateral security held for that debt, must, in order to bind the surety, be assented to by him; otherwise the surrender of the collaterals without his consent will release him from obligation as surety. *Id.*
3. ———: **TO WHAT EXTENT DISCHARGED: OTHER SURETIES.** Where a note with a surety is given for a portion of a prior debt, for which the creditor holds bonds secured by mortgage as collateral security, and he surrenders such collaterals without the surety's consent, the surety is discharged to the extent of the value of the bonds so surrendered; and such value is to be determined in the county where the mortgaged land lies, rather than in that where the trial is pending, and is to be estimated at the time of the surrender, and not at the time of trial; and the fact that there are other sureties on other notes given to secure portions of the same prior debt, which sureties are not in the case, does not affect the surety's right to be discharged to the full value of the surrendered bonds. *Id.*
4. ———: **ESTOPPEL TO DENY VALUE.** In such case, where the creditor has recognized the value and validity of the collaterals, and has received money thereon, which should have been applied on the secured debt, he cannot claim that the surety should not be released, on the ground that the bonds were issued in excess of corporate power, and, therefore, were invalid and of no value. *Id.*
5. **RIGHTS OF.** See Banks and Banking, 1, 2.
6. **ON BAIL BONDS.** See Criminal Law, 18, 20, 21
7. **ON DELIVERY BOND.** See Replevin, 1.

TAXATION.

1. **EASEMENT: POSSESSION OF LAND UNDER: WHO PAYS TAXES.** One who has the actual and exclusive possession of land under an easement, with the right to so hold it forever, must pay the taxes on the land, and not he who has the empty title. (See opinion for citations.) *City of Muscatine v. Chicago, R. I. & P. Ry. Co.*, 645.
2. **MISDESCRIPTION: ESTOPPEL.** Water street in the plaintiff city formerly ran along and adjacent to the north bank of the Mississippi river, but by a contract between the city and defendant it was located further north, and the land between the street, as thus located, and the river was granted to defendant, and occupied by it. When a special tax was levied upon such land, described as lying between Water street and the river, *held* that the defendant could not be heard to say that the description was an impossible one, and the levy therefore invalid, on the ground that there was no land between Water street and the river. *Id.*

TAXES.

1. COLLECTION BY ACTION. See Cities and Towns, 13.
2. TAXES ON EASEMENT: WHO PAYS. See Taxation, 1.

TAX SALE AND DEED.

1. NOTICE TO REDEEM: PERSON TO WHOM LAND IS TAXED. Where land sold for taxes is taxed to an unknown owner when the notice to redeem, required by section 894 of the Code, should be given, no notice is required. (See opinion for citations.) And where, at the time for giving such notice, the land was taxed to an unknown owner, but the holder of the tax-sale certificate had paid the taxes, and the treasurer, after his custom, had entered his name opposite the description of the land in the tax list, in the column of owner's names, this did not amount to a taxation of the land to him, and he was not required to serve notice upon himself of the expiration of the time for redemption, in order to make valid his tax deed for the land. *Irwin v. Burdick*, 69.
2. DEFECTIVE NOTICE TO REDEEM: CURED BY TIME AS AGAINST PRIOR MORTGAGE. Although the proof of publication of notice to redeem from a tax sale is defective, the defect is cured by possession of the land for five years under the tax deed made pursuant to such notice, not only as against the former owner seeking to recover the land, but also as against a mortgagee of the former owner seeking to foreclose his mortgage; for the mortgage lien is extinguished with the title on which it is based. (See opinion for citations.) *Bull v. Gilbert*, 547.
3. TAXES NOT BROUGHT FORWARD: ERROR CURED BY TIME AND POSSESSION. Where land was sold in the year 1867 for the taxes of 1866, which were not brought forward upon the tax list of 1867, as required by section 845 of the Code, *held* that the defect was cured, as against the owner of the patent title, by the lapse of fifteen years, and the actual, open and notorious possession of the land during the last eight of those years by the holder of the tax title. (See *Griffin v. Bruce*, 73 Iowa, 126.) *Collins v. Vallean*, 626.
4. ACTION TO REDEEM: NEW TRIAL WITHOUT NOTICE: CERTIORARI. Plaintiffs brought this action in equity to redeem land from a tax sale and deed, on the ground that no notice of the expiration of the time of redemption was given, as required by section 894 of the Code; and they also asked that the rents be set off against the taxes, and that they have a writ of possession. Their prayer was granted, and decree entered accordingly. Afterwards, a purchaser from the defendant in that action moved the court for a new trial, which motion was granted without notice to plaintiffs, on the ground that the action was one to recover real property, and that, therefore, no notice of the motion for new trial was necessary, under Code, sections 8268 and 8269. But *held*—
 - (1) That the action was brought under section 893 of the Code, to redeem from a tax sale after a deed had been executed, and that its character was not changed by the asking of other relief, which was merely incidental.
 - (2) That the court had no jurisdiction to grant a new trial without notice to plaintiffs.
 - (3) That *certiorari*, and not appeal, was their proper remedy, since they were not present to enter exceptions to the ruling, and appeal would have been unavailing. *Callanan v. Lewis*, 452.

TENANCY IN COMMON.

See HOMESTEADS, 2 ; PARTITION, 1, 2 ; RAILROADS, 1.

TENDER.

1. **ADMISSION OF LIABILITY.** To make a tender of money to a claimant is an admission of liability to the amount of the tender. (See opinion for citations.) *Rainwater v. Hummell*, 571.
2. **DEPOSIT IN BANK WITHOUT NOTICE.** Where defendant tendered to plaintiff money which he was owing him, and plaintiff refused it, defendant was not discharged from liability by depositing the money in a bank to plaintiff's credit, without notifying him thereof until after the bank had failed. *Id.*
3. **OF NO AVAIL IF NOT KEPT GOOD.** One who makes a tender which is refused, and who fails to keep it good by bringing the money into court when sued on the demand, and refuses to pay the sum when afterwards demanded, loses the benefit of the tender. *Id.*

TRESPASS.

See INJUNCTIONS, 1.

TRUSTS.

1. **LEGATEES CHARGED WITH TRUSTS : REMOVAL BY COURT.** Persons to whom money is bequeathed, but who are charged with the duty to use it for the benefit of others, are, considered in their relation to the testator and the will, legatees, but considered in their relation to the beneficiaries of the property, they are trustees, and, as such, upon their refusal to act, they may be removed by the court, and others appointed in their stead, to the end that the trust fail not ; and the persons so appointed may demand and collect the money of the executor. (Compare *Perry v. Drury*, 56 Iowa, 60, and *Seda v. Huble*, 75 Iowa, 429.) *In re Estate of Petranek*, 410.
2. **ACTION AGAINST TRUSTEES TO DISCOVER PROPERTY.** See Creditors' Bills, 1, 2.

USURY.

- IN JUDGMENTS CONFESSED : NEW NOTES : DEFENSE.** Defendants, in actions brought against them, after filing answers, consented to judgments against them on certain notes. Afterwards new notes were given for the amount of the judgments. *Held* that, if the judgments were rendered upon usurious notes, and were confessed merely as a means of evading the law against usury, the defense of usury might be set up against the new notes, but that the makers of the notes would have the burden to prove that the judgments were of that character, and that in this case (see opinion for evidence) they failed to establish that fact. (See opinion for citations.) *Stoddard v. Lloyd*, 11.

VENDORS AND PURCHASERS.

1. **FRAUD : RESCISSION : EVIDENCE.** The evidence in this case (see opinion) is *held* to show that defendants, who knew the value of the property on both sides, conveyed to plaintiffs land in the state of Missouri, worth one hundred and sixty dollars, in exchange for property in Iowa (where all the parties resided) and notes of the plaintiffs worth in the aggregate twelve hundred dollars, and that defendants induced plaintiffs to make the exchange by false representations as to the quality, location and value of the land ; wherefore it is *held* that the decree of the district court rescinding the contract was justified. *Stroff v. Swafford*, 185.

2. ———: ———: **TENDER.** In such case, although defendants had, prior to the beginning of the action for rescission, paid off an incumbrance on the property conveyed by plaintiffs to them, it was not necessary for plaintiffs, in order to recover, to tender the defendants the amount so paid; because defendants had conveyed the property, so that it could not be reconveyed to plaintiffs, and the decree could and did credit defendants with the amount in fixing the money judgment which they should pay in lieu of the property. *Id.*
3. ———: ———: **EXCESSIVE DEMAND.** Nor could a decree for rescission be avoided in such case because plaintiffs, in their offer to rescind, demanded their property back, and also their damages on account of expense and trouble; especially where there was nothing to show that defendants were disposed to make a restitution on any terms. *Id.*
4. ———: ———: **DELAY.** Where in such case it appeared that defendants agreed, when the contract was made, that, if their representations were not true, the property of plaintiffs was to be returned and damages paid, an action for rescission, based upon such agreement, could be maintained, though the offer to rescind was not made as promptly as is required where rescission is demanded on the ground of fraud alone. *Id.*
5. ———: ———: **DAMAGE TO LAND IN THE MEANTIME.** Nor could defendants in such case avoid a rescission on the ground that, in the meantime, timber had been stolen from the land in Missouri, so that they could not be placed *in statu quo* by a reconveyance to them,—it appearing that plaintiffs had not been in possession of the land, nor responsible for the theft, and that it would doubtless have occurred had there been no change in the title. *Id.*
6. **MORTGAGED PROPERTY: EXTENSION OF TIME TO PURCHASER: PERSONAL LIABILITY.** Where one purchases mortgaged property, subject to the mortgage, but without assuming to pay the mortgage debt, which is not yet due, and he afterwards negotiates an extension of time on the debt, but expressly stipulates with the holder of the mortgage that he is not thereby to become personally responsible for the debt, he does not become so responsible, though the mortgaged property so depreciates in value as to become insufficient security for the debt. *Duncan v. Finn*, 658.
7. **RESALE UPON AGREEMENT TO ACCOUNT: RESCISSION.** Where the plaintiff conveyed land to the defendant to secure a debt, and it was afterwards agreed that the latter should sell the land and, after paying the debt and another lien, should account to plaintiff for the balance of the proceeds, and the plaintiff ratified a sale so made by surrendering possession of the premises to the defendant's vendee, *held* that plaintiff's right to recover the balance of the proceeds could not be defeated by a rescission of the sale by the defendant and his vendee, without plaintiff's consent. *Pelley v. Walker*, 142.
8. **QUITCLAIM DEED: PRIOR EQUITIES: NOTICE PRESUMED.** One who takes a mere quitclaim deed for real estate is conclusively presumed to have notice of prior equities and takes subject thereto, and so an unrecorded bond for a deed takes precedence of a subsequent quitclaim deed, though the deed is based upon a valuable consideration and is taken without actual notice of the bond. Section 1941 of the Code, which provides that "no instrument affecting real estate is of any validity against subsequent purchasers for a

valuable consideration, without notice, unless recorded," etc., does not apply, because the law presumes notice on the part of the grantee in a quitclaim deed. (See opinion for cases followed. (*Pettingill v. Devin*, 85 Iowa, 853, *overruled*.) *Steele v. Sioux Valley Bank*, 389.

9. **VENDOR'S LIEN: AGREEMENT TO EXECUTE MORTGAGE.** Where a purchaser of land paid a part of the price and took possession, and agreed to execute a mortgage for the residue, and the mortgage which was prepared, and which he was to execute, but which he never did execute, provided that he should keep the taxes paid, and he failed to pay them, and the vendor paid them to preserve his security, *held* that the vendor had a lien, according to the terms of the prepared mortgage, not only for the residue of the purchase price, but also for the taxes paid by him. *Devin v. Eagleson*, 269.
10. ——— : ——— : **JUDGMENT CREDITORS: PRIORITY.** In such case, where merchants extended credit to the purchaser after the purchase, but before his deed was recorded, but they did so not knowing of nor relying upon his purchase of the land, and, after the deed was recorded, they procured a judgment against him, which became a lien on the land, *held* that such lien was inferior to the vendor's lien for purchase money and taxes. *Id.*
11. ——— : ——— : **EXTINGUISHMENT BY VENDEE'S INSOLVENCY AND ASSIGNMENT.** The vendor's lien in such case, not being a mere equity, but based upon a contract which a court of equity will enforce, is not extinguished by the insolvency of the vendee, and his assignment. Code, section 1940, which provides that no vendor's lien for unpaid purchase money shall be valid after a conveyance by the vendee, unless reserved by a proper instrument in writing, duly acknowledged and recorded, does not apply to a lien thus created by contract. (See opinion for citations.) *Id.*
12. ——— : **LOST BY MINGLING WITH OTHER DEBTS.** Plaintiff and defendant exchanged lands in such a way that defendant was to pay plaintiff five hundred dollars in thirty days as the difference between the values of the properties, but the agreement included other transactions, to be done in the meantime, involving expenditures of money, all of which, together with the item of five hundred dollars first named, were settled together, and a balance of one thousand dollars was thus found to be due plaintiff from defendant, for which defendant then executed his notes. *Held* that, by allowing the five-hundred-dollar demand to be thus blended with other demands, he waived his right to a vendor's lien therefor. *Erickson v. Smith*, 374.
13. ——— : **AGREEMENT TO MORTGAGE LAND TO SECURE PURCHASE MONEY.** See Statute of Frauds, 1.

VENUE.

CHANGE OF. See Criminal Law, 27.

VERDICT.

1. **SPECIAL INTERROGATORIES: INDEFINITE ANSWERS.** Where the general verdict could not have been controlled by any answers that might have been made truthfully to special interrogatories, the fact that some of them were not answered accurately, and others not answered at all, is no ground for reversal. *Pence v. Chicago, R. I. & P. Ry. Co.*, 389.
2. **PERSONAL INJURY: AMOUNT.** Where a physician with a life expectancy of twenty-three years, and with a practice worth from twelve hundred to fifteen hundred dollars per year, was almost totally disabled by defendant's negligence, and incurred great

suffering and expense on account thereof, a verdict for twenty-four thousand dollars' damages, nine thousand dollars of which was remitted to avoid a new trial, was not so large as to evince passion or prejudice on the part of the jury,—no improper motives being apparent. *Id.*

WARRANTY.

1. **CONDITION BROKEN.** See Sales, 5.
2. **WHEN IMPLIED BY LAW.** See Sales, 9.

WATERS.

1. **COLLECTION BY TILE DRAINS: CASTING ON LOWER ESTATE.** The owner of the dominant or higher estate has the right to conduct the water falling upon his land, by means of underground tile drains, into the channel provided by nature for the drainage of his land, and through such channel to cast it upon the servient or lower estate. *Vannest v. Fleming*, 638.
2. **DRAINAGE BY ACQUIESCENCE: SUBSEQUENT CHANGE.** Where a drain or ditch has been established by the acquiescence of two adjoining land-owners, and it is required by the best interests of both owners, and the manner of its construction is in accord with the natural flow of the water, and the quantity of the water has not been increased nor its flow diverted by the owner of the higher land, the lower or servient owner cannot obstruct or abolish the ditch without the consent of the upper owner; and the rights and duties of the parties pass to their grantees with the land. *Id.*
3. **DRAINAGE BY AGREEMENT: SUBSEQUENT CHANGE.** Where a ditch for the drainage of surface water has been constructed jointly by two adjoining land-owners, under an oral agreement as to its course, etc., each party contributing labor or money to its construction, and they have recognized the ditch by plowing and farming in accord with it, neither can set aside or disregard it without the consent of the other. *Id.*

WILLS.

1. **REVOCATION: EQUITY.** See Homesteads, 8.
2. **LEGATEES CHARGED WITH TRUSTS: REMOVAL BY COURT.** See Trusts, 1.

WITNESSES.

1. **IMPEACHMENT.** See Criminal Law, 11.
2. **MILEAGE.** See Criminal Law, 15.

WORDS AND PHRASES.

1. **"AIDING AND ABETTING."** See Criminal Law, 13.
2. **BANK "DEPOSIT."** See Criminal Law, 33.
3. **"INSOLVENCY."** See Criminal Law, 41.
4. **"LEWDNESS."** See Criminal Law, 46.
5. **"NON-RESIDENT ALIEN."** See Dower, 1.
6. **"PURCHASER."** See Dower, 2.
7. **"HEIRS."** See Insurance, 5.
8. **"TRIAL."** See Justices of the Peace, 2.
9. **"CONTROL" OF COLLATERAL SECURITIES.** See Sureties, 1.

